Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

Vol. 12 JULY 5, 1978 No. 27

This issue contains

DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service
Treasury Decisions

(T.D. 78–183)

Bonds

Approval and discontinuance of Carrier bonds, Customs Form 3587

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 14, 1978.

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of list.

Name of principal and surety	Date of Bond	Date of Approval	Filed with district director/area director/amount
American Export Lines, Inc., 17 Battery Place, New York, NY; water carrier; Insurance Co. of North America D 4/26/78	Aug. 15, 1977	Sept. 7, 1977	New York Seaport; $100,000
Ascot Trucking Corporation, 441 N. May St., Chicago, IL; motor carrier; Transamerica Ins. Co.	May 9, 1978	May 17, 1978	Chicago, IL; $35,000
Applegate Drayage Co., P.O. Box 2728, Sacramento, CA; motor carrier; Mid-Century Ins. Co. (PB 4/16/76) D 10/19/77	Jan. 6, 1978	Feb. 27, 1978	San Francisco, CA; $25,000
Canadian Auto Xarriers, Ltd., 1005 Derwent Wy Annacis Is., New Westminster, B. C., Canada; motor carrier; Federal Ins. Co. (PB 1/15/68) D 4/25/78 [1]	March 6, 1978	April 26, 1978	Seattle, WA; $25,000

See footnotes at end of table.

Name of principal and surety	Date of Bond	Date of Approval	Filed with district director/area director/amount
Citizens Warehouse Trucking Co., Inc., 2455 East 27th St., Los Angeles, CA; motor carrier; Washington International Ins. Co. D 5/5/78	May 25, 1977	June 8, 1977	Los Angeles, CA; $50,000
Explorer Pipeline Co., P.O. Box 2650, Tulsa, OK; pipe line; Seaboard Surety Co. D 5/12/78	May 17, 1973	May 18, 1973	Houston, TX; $300,000
Farruggio's Bristol, 1419 Radcliff St., Bristol, PA; motor carrier; Reliance Ins. Co. (PB 9/5/74) D 10/5/77 [3]	Oct. 1, 1977	Oct. 6, 1977	Philadelphia, PA; $50,000
J. Clint Fleming, Inc., 164 Old Greensboro Highway, Danville, VA; motor carrier; Western Surety Co. (PB 5/22/75) D 5/22/78 [3]	May 22, 1978	May 22, 1978	Norfolk, VA; $25,000
Coy Harris and Son, 312 E. 2nd St., Weatherford, TX; motor carrier; Peerless Ins. Co. D 1/22/75	May 22, 1972	June 15, 1972	Laredo, TX; $25,000
Donald A. Hosford, d/b/a The Herbert C. Hosford Co., 1222 Linden Ave., Erie, PA; freight forwarder; St. Paul Fire & Marine Ins. Co.	May 11, 1978	May 31, 1978	Cleveland, OH; $50,000
Lapadula Air Freight Transfer Inc., 149-04 New York Blvd., Jamaica, NY; motor carrier; Peerless Ins. Co. D 4/8/78	Apr. 28, 1977	Apr. 29, 1977	New York Seaport; $50,000
Lapp Express Co., Inc., Maple Ridge Rd., Medina, NY; motor carrier; Liberty Mutual Ins. Co. D 5/12/78	July 8, 1970	July 16, 1970	Buffalo, NY; $25,000
Lawrenceburg Transfer Inc., P. O. Box 220, Lawrenceburg, KY; motor carrier; Reliance Ins. Co. (PB 3/1/74) D 6/2/78 [4]	Mar. 1, 1978	June 2, 1978	Cleveland, OH; $50,000
Liquid Cargo Lines Limited, 452 Southdown Rd., Clarkson, Mississauga, Ontario, Canada; motor carrier; United States Fidelity & Guaranty Co.	Mar. 2, 1978	May 24, 1978	Buffalo, NY; $25,000
Motor Dispatch, Inc., 2559 S. Archer Ave., Chicago, IL; motor carrier; St. Paul Fire & Marine Ins. Co. D 5/25/78	Sept. 16, 1976	Sept. 16, 1976	Chicago, IL; $35,000
Patton's, Inc., 2300 Canyon Rd., Ellensburg, WA; motor carrier; Allied Fidelity Ins. Co. D 9/14/77	July 27, 1976	July 28, 1976	Seattle, WA; $25,000
Raymond J. Francis d/b/a Port Transport, 415 West 30th St., National City, CA; motor carrier; St. Paul Fire & Marine Ins. Co. D 5/27/78	Apr. 14, 1976	June 16, 1976	San Diego, CA; $50,000
Scalea's Airport Service, Inc., Calcon Hook Road & Hook Rd., Sharon Hill, PA; motor carrier; Transamerica Ins. Co.	Apr. 27, 1978	May 5, 1978	Philadelphia, PA; $25,000

See footnotes at end of table.

Name of principal and surety	Date of Bond	Date of Approval	Filed with district director/area director/amount
Aaron Smith Trucking Co., Inc., P.O. Box 153, Dudley, NC; motor carrier; Protective Ins. Co.	Apr. 28, 1978	May 22, 1978	Wilmington, NC; $25,000
Tanney's Motor Transportation, Inc., 10 Northway Lane, P.O. Box 610, Latham, NY; motor carrier; St. Paul Fire & Marine Ins. Co.	Dec. 2, 1977	Apr. 20, 1978	New York Seaport; $50,000
Terminal Refrigerated Transport, 1315 East Seventh St., Los Angeles, CA; motor carrier; Hartford Accident & Indemnity Co. D 10/14/77	Sept. 1, 1959	Sept. 21, 1959	Los Angeles, CA; $10,000
Trans-Cold Express, Inc., P.O. Box 1228, D/FW Airport, TX; motor carrier; National Bonding & Accident Ins. Co. PB (5/13/74) D 5/10/78 [5]	May 13, 1978	May 10, 1978	Chicago, IL; $50,000

[1] Surety is Fidelity & Deposit Co. of Md.
[2] Principal is Farruggio's Bristol & Philadelphia Auto Express, Inc. Surety is American Employer's Ins. Co.
[3] Principal is John C. Fleming d/b/a J. Clint Fleming, Inc. Surety is American Motorists Ins. Co.
[4] Principal is Ernest W. Ripy, Jr. & Thomas B. Ripy d/b/a Lawrenceburg Transfer Co.
[5] Surety is Safeco Ins. Co. of America.

(BON-3-03)

D. W. LEWIS
for LEONARD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

(T.D. 78-184)

Synopses of drawback decision

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 14, 1978.

The following are synopses of drawback rates and amendments issued February 8, 1977 to September 15, 1977, inclusive, pursuant to section 22.1 and 22.5, inclusive, Customs Regulations.

In the synopses below are listed, for each drawback rate or amendment approved under section 1313(a), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the effective

dates of exportation, the Regional Commissioner who issued the rate, and the date on which it was issued.

(DRA-1-09)

D. W. LEWIS
for LEANORD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

(A) Company: Atwood & Morrill Co., Inc.
Articles: Valves & parts thereof
Merchandise: Imported metal castings
Factories: Salem, MA and Washington, NC
Statement signed: March 9, 1977
Basis of claim: Used in
Effective date: February 7, 1977
Rate issued by RC of Customs: Boston, April 1, 1977

(B) Company: Borg-Warner Corp., Byron Jackson Pump Division
Articles: Centrifugal pumps
Merchandise: Imported electric motors
Factory: Vernon, CA
Statement signed: March 28, 1977
Basis of claim : Used in
Effective date: September 23, 1976
Rate issued by RC of Customs: Los Angeles, April 21, 1977

(C) Company: Buckbee-Mears Co.
Articles: Television grilles
Merchandise: Imported low carbon cold rolled steel sheet in coils
Factory: St. Paul, MN
Statement signed: May 5, 1977
Basis of claim: Appearing in
Effective date: July 14, 1975
Rate issued by RC of Customs: Chicago, May 12, 1977

(D) Company: Capital City Products Company, Division of Stokely Van Camp, Inc.
Articles: Various vegetable oil products
Merchandise: Various vegetable oils and vegetable oil products, either imported or produced under drawback regulations
Factories: Columbus, OH and West New York, NJ
Statement signed: February 4, 1976

Basis of claim: Used in, with distribution to the products obtained in accordance with their relative value at the time of separation
Effective date: Factory at Columbus, OH—April 13, 1967
Factory at West New York, NJ—January 1, 1973
Amendment issued by RC of Customs: Chicago, February 8, 1977
Amends: T.D. 68–51–U to provide for (1) a broader coverage of articles produced and merchandise used; (2) change in basis of claim from "appearing in"; and (3) West New York, NJ factory

(E) Company: Chapman Chemical Company
Articles: Ambrocide (insecticide for treatment of lumber and logs) and Ambrite T (insecticide for treatment of logs and lumber and a wood preservative)
Merchandise: Imported 40% Benzene Hexachloride—Fortified
Factory: Memphis, TN
Statement signed: February 28, 1977
Basis of claim: Used in
Effective date: April 15, 1977
Rate issued by RC of Customs: New Orleans, March 2, 1977

(F) Company: Clark Equipment Company, Melroe Division
Articles: Self-propelled earth moving equipment (Bobcat loaders), among other things
Merchandise: Imported gasoline engines, among other things
Factories: Gwinner and Bismarck, ND; Spokane, WA
Statement signed: March 1, and May 31, 1977
Basis of claim: Used in
Effective date: April 5, 1976
Amendment issued by RC or Customs: Chicago, August 18, 1977
Amends: T.D. 68–230–G, as amended, to cover additional process above at its Gwinner, ND and Spokane, WA factories

(G) Company: Commonwealth Petrochemicals, Inc. (a wholly-owned subsidiary of Commonwealth Oil Refining Company, Inc.)
Articles: Benzene, Toluene, Xylene, Orthoxylene, Raffinate
Merchandise: Imported and drawback crude petroleum, unfinished Virgin naphtha, unfinished Virgin gas oil, unfinished L.P.G., unfinished hydrocargon mixture, unfinished light distillate, and crude condensate
Factories: Tallaboa and Penueles, PR
Statement signed: April 22, 1974

Basis of claim: Used in
Effective date: December 20, 1971
Rate issued by RC of Customs: Miami, July 19, 1977

(H) Company: Corco Cyclohexane, Inc. (a wholly owned subsidiary of Commonwealth Oil Refining Co., Inc.)
Articles: Cyclohexane
Merchandise: Drawback benzene
Factory: Ponce, PR
Statement signed: October 19, 1972
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative value at the time of separation
Effective date: April 13, 1973
Amendment issued by RC of Customs: Miami, August 25, 1977
Amends: T.D. 73–50–G, to cover change in name from Shell and Commonwealth Chemicals, Inc.

(I) Company: Data General Corporation
Articles: Computers, additional memory, peripheral computer equipment and subsystems
Merchandise: Imported 8K and 16K core memory boards
Factories: Westbrook, ME; Southboro and Framingham, MA; Cary, NC; Portsmouth, NH; Fairfield, NJ; Sunnyvale, CA
Statement signed: June 29, 1977
Basis of claim: Appearing in
Effective date: September 11, 1973
Amendment issued by RC of Customs: San Francisco, July 29, 1977
Amends: T.D. 75–164–I, to cover peripheral subsystems with use of above merchandise and additional factories

(J) Company: Foot-Joy, Inc.
Articles: Shoes
Merchandise: Imported finished upper leather
Factory: Brockton, MA
Statement signed: February 18, 1977
Basis of claim: Used in
Effective date: October 18, 1976
Rate issued by RC of Customs: Boston, March 7, 1977

(K) Company: General Cigar and Tobacco Co.
Articles: Sauced burley scrap tobacco
Merchandise: Imported burley scrap tobacco
Factory: Wheeling, WV

Statement signed: March 22, 1977
Basis of claim: Used in
Effective date: February 14, 1977
Rate issued by RC of Customs: New Orleans, April 11, 1977

(L) Company: George Engine Company, Inc. (GECO)
Articles: Complete generator sets
Merchandise: Imported diesel engines (including one set each of exhaust bellows, transition pieces, intermediate exhaust pipe, exhaust bellows for collection pipe for each engine)
Factory: Harvey, LA
Statement signed: August 19, 1977
Basis of claim: Used in
Effective date: August 24, 1977
Rate issued by RC of Customs: New Orleans, August 26, 1977

(M) Company: Griffin Corp.
Articles: Atrazine, flowable
Merchandise: Imported atrazine
Factory: Valdosta, GA
Statement signed: December 10, 1976
Basis of claim: Used in
Effective date: February 15, 1977
Rate issued by RC of Customs: Boston, February 8, 1977

(N) Company: K & K Manufacturing, Inc.
Articles: Calcium lead anodes
Merchandise: Drawback lead pigs
Factory: Tucson, AZ
Statement signed: January 24, 1977
Basis of Claim: Appearing in
Effective date: November 1, 1976
Rate issued by RC of Customs: Los Angeles, April 28, 1977

(O) Company: National Machinery Company
Articles: Complete rivet headers
Merchandise: Imported incomplete rivet headers
Factory: Tiffin, OH
Statement signed: August 22, 1977
Basis of claim: Used in
Effective date: August 30, 1977
Rate issued by RC of Customs: Baltimore, September 15, 1977

(P) Company: Norris Industries, Inc.
Articles: 130 MM Cartridge cases

267-954—78——2

Merchandise: Imported brass circles or blanks alloy No. 260
Factory: Los Angeles, CA
Statement signed: August 17, 1977
Basis of claim: Appearing in
Effective date: July 1, 1977
Rate issued by RC of Customs: Los Angeles, August 30, 1977

(Q) Company: Ralston Purina Co.
Articles: Nequinate
Merchandise: Imported poultry feed
Factory: Bridgeton, MO
Statement signed: March 24, 1977
Basis of claim: Used in
Effective date: July 6, 1971
Amendment issued by RC of Customs: Boston, March 28, 1977
Amends: T.D. 49230–B to cover new process above

(R) Company: Raychem Corp.
Articles: Hydraulic coupling liners
Merchandise: Imported Hiduron 191 insert blanks
Factory: Menlo Park, CA
Statement signed: February 10, 1977
Basis of claim: Appearing in
Effective date: January 1, 1977
Rate issued by RC of Customs: San Francisco, March 15, 1977

(S) Company: Renauld International Ltd.
Articles: Sunglasses
Merchandise: Imported lenses, frames, hinges, temples and lens blanks
Factory: Fitchburg, MA
Statement signed: August 9, 1977
Basis of claim: Appearing in
Effective date: June 28, 1977
Rate issued by RC of Customs: Boston, September 2, 1977

(T) Company: Republic Powdered Metals
Articles: Asphalt base aluminum roof coatings, aluminum paints and similar coatings
Merchandise: Imported aluminum paste
Factories: Medina, OH and Gilroy, CA
Statements signed: January 3, 1977 and February 24, 1977
Basis of claim: Used in
Effective date: June 3, 1976
Rate issued by RC of Customs: Chicago, March 25, 1977

(U) Company: Rodenstock Corporation
Articles: Assembled spectacle frames and parts of spectacle frames
Merchandise: Imported acetate material, hinge inserts, hinges, screws, nosepads, locknuts
Factory: Yauco, PR
Statement signed: June 14, 1977
Basis of claim: Used in
Effective date: October 7, 1976
Rate issued by RC of Customs: Miami, August 30, 1977

(V) Company: The Rucker Company
Articles: Blowout preventors
Merchandise: Imported steel castings
Factories: Brea, CA and Beaumont, TX
Statement signed: August 9, 1977
Basis of claim: Appearing in
Effective date: February 17, 1977
Rate issued by RC of Customs: San Francisco, August 29, 1977

(W) Company: Sioux Veneer Panel Co., Inc.
Articles: Decorative wall plywood panel
Merchandise: Imported lauan plywood
Factories: Boise, ID and Hanahan, SC
Statement signed: January 18, 1977
Basis of claim: Used in
Effective date: August 11, 1976
Amendment issued by RC of Customs: San Francisco, February 9, 1977
Amends: T.D. 75-39-0 to cover Hanahan, SC factory

(X) Company: Smith & Wesson Leather Company
Articles: Leather belts & shoulder straps for holsters
Merchandise: Imported metallic components—Dees, Hooks, etc.
Factory: Springfield, MA
Statement signed: April 18, 1977
Basis of claim: Appearing in
Effective date: March 16, 1977
Rate issued by RC of Customs: April 25, 1977

(Y) Company: Southwick Machine Company
Articles: Deck winches
Merchandise: Imported winch parts
Factory: Portland, ME
Statement signed: February 10, 1977
Basis of claim: Used in

Effective date: January 1, 1976
Rate issued by RC of Customs: Boston, March 8, 1977

(Z) Company: U.S. Cylinders, Inc.
Articles: Completed acetylene cylinders (various sizes)
Merchandise: Imported empty unfinished steel acetylene cylinder shells (various sizes)
Factory: Citronelle, AL
Statement signed: May 16, 1977
Basis of claim: Used in
Effective date: March 10, 1977
Rate issued by RC of Customs: New Orleans, May 20, 1977

(T.D. 78–185)

Cotton Textile Products—Restriction on Entry

Restriction on entry of cotton textile products manufactured or produced in Pakistan

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 19, 1978.

There is published below a directive of May 12, 1978, received by the Commissioner of Customs from the Chairman, Committee for the Implementation of Textile Agreements, concerning the exemption from levels of restraint of certain cotton textile products manufactured or produced in Pakistan. This directive amends, but does not cancel, that Committee's directive of January 19, 1978 (T.D. 78–71).

This directive was published in the FEDERAL REGISTER on May 17, 1978 (43 FR 21346), by the Committee.

(QUO–2–1)

WILLIAM D. SLYNE
For JOHN B. O'LOUGHLIN,
Director,
Duty Assessment Division

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Industry and Trade
Washington, D.C. 20230

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

May 12, 1978

Commissioner of Customs
Department of the Treasury
Washington, D.C. 20229

Dear Mr. Commissioner:

This directive amends, but does not cancel, the directive issued to you on January 19, 1978 by the Chairman of the Committee for the Implementation of Textile Agreements which designated levels of restraint for certain cotton textiles and cotton textile products, produced or manufactured in Pakistan, which may be entered or withdrawn from warehouse for consumption in the United States during the twelve-month period which began on January 1, 1978. It also amends, but does not cancel, the directives of June 28, 1972, May 16, 1973, and January 15, 1974 which established an export visa requirement for entry into the United States for consumption and withdrawal from warehouse for consumption of cotton textiles and cotton textile products, produced or manufactured in Pakistan, and administrative mechanisms to exempt certain traditional Pakistan items and handloomed products of the cottage industry of Pakistan from the levels of restraint of the bilateral agreement.

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 15, 1977; pursuant to the Bilateral Cotton Textile Agreement of January 4 and January 9, 1978 between the Government of the United States and Pakistan; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, the aforementioned directives are amended, effective on May 17, 1978, to exempt Peshawari waist coats, in addition to previously designated items, when they are properly certified. A Peshawari waist coat is defined as a "vest-type jacket worn in the Northwest Frontier Province of Pakistan. The garment is made from velvet and lined with heavy cotton fabric. It is heavily embroidered with lame braid."

The actions taken with respect to the Government of Pakistan and with respect to imports of cotton textile products from Pakistan have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States.

Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the FEDERAL REGISTER.

Sincerely,

ROBERT E. SHEPHERD
Chairman, Committee for the Implementation of Textile Agreements, and Deputy Assistant Secretary for Domestic Business Development

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(T.D. 78-186)

Cotton, Wool, and Manmade Fiber Textile Products—Restriction on Entry

Restriction on entry of cotton, wool and manmade fiber textile products manufactured or produced in the Republic of China

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 19, 1978

There is published below a directive of April 27, 1978, received by the Commissioner of Customs from the Acting Chairman, Committee for the Implementation of Textile Agreements, concerning the exemption from levels of restraint of certain cotton, wool and manmade fiber textile products manufactured or produced in the Republic of China. This directive further amends, but does not cancel, that Committee's directive of April 19, 1973 (T.D. 73-128).

This directive was published in the FEDERAL REGISTER on May 2, 1978 (43 FR 18737), by the Committee.

(QUO-2-1)

WILLIAM D. SLYNE
For JOHN B. O'LOUGHLIN,
Director, Duty Assessment Division

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Industry and Trade
Washington, D.C. 20230

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

April 27, 1978

Commissioner of Customs
Department of the Treasury
Washington, D.C. 20229

Dear Mr. Commissioner:

This directive further amends, but does not cancel, the directive of April 19, 1973 from the Chairman, Committee for the Implementation of Textile Agreements, which established a certification procedure to exempt certain traditional textile products from the levels of restraint of bilateral textile agreements between the Governments of the United States and the Republic of China.

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 15, 1977; pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of December 16, 1977, as amended, between the Governments of the United States and the Republic of China; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, the directive of April 19, 1973 is further amended, effective on May 1, 1978, to exempt traditional Chinese caps, in addition to those items previously designated, when they are properly certified. A complete list of currently exempt items is enclosed.

The actions taken with respect to the Government of the Republic of China and with respect to imports of cotton, wool and man-made fiber textile products from the Republic of China have been determined by the Committee for the Implementation of Textiles Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the FEDERAL REGISTER.

Sincerely,

ARTHUR GAREL
Acting Chairman, Committee for the Implementation of Textile Agreements

Designated Exempt Textile Products From The Republic of China

1. Pincushions
2. Embroideries (needlework), of man-made fabrics with designs embroidered with wool thread
3. Handmade carpets, i.e., in which the pile was inserted or knotted by hand
4. Christmas or Easter ornaments having a non-textile core or a non-textile structured frame and man-made fiber textile covering;
5. Toy (novelty) animals, birds or insects with a plastic, wire, or other non-textile core that are covered or decorated with textile thread or fiber
6. Judo Uniforms
7. Karate Uniforms
8. Kung Fu Uniforms
9. Traditional Chinese Padded Jackets
10. Traditional Chinese Caps

(T.D. 78–187 through 78–201)

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 19, 1978

The following decisions made by the United States Customs Service involve issues of sufficient general interest or importance to warrant publication in the Customs Bulletin.

DONALD W. LEWIS
for Assistant Commissioner
Regulations and Rulings

(T.D. 78-187)

Classification: "Unisex" vest filled with down and feathers

DATE: Sept. 30, 1977
FILE: CLA-2:R:CV:MC
052552 FF

TO: Area Director of Customs
New York Seaport
New York, New York 10048

FROM: Director, Classification and Value Division

SUBJECT: Internal Advice Request No. 102/77 concerning tariff classification of nylon vests with feather and down filling

This is in reply to your request for internal advice on the tariff classification of nylon vests with feather and down filling from Taiwan. The request was initiated by (names) in a letter dated September 13, 1976. No sample was submitted.

The merchandise in question is described as a "unisex down vest" with a filling of 80 percent grey duck down and 20 percent small grey duck feathers, a fabric shell consisting of a solid color, down proof, 100 percent nylon taffeta body and a printed, down proof, 100 percent nylon taffeta upper yoke and collar, a one-way No. 5 delrin front zipper, and a rear kidney flap. The described merchandise comes in five different sizes, XS, S, M, L, and XL. The manufacturer of the subject merchandise submitted a Certificate which states that the down used in the merchandise has a value of $0.49 per ounce and that the feathers used therein have a value of $0.13 per ounce; that Certificate also indicates that the combined weight of the down and feathers contained in each of the five sizes is as follows: 4.5 ounces (XS), 4.8 ounces (S), 5.0 ounces (M), 5.3 ounces (L), and 5.5 ounces (XL). Although this Certificate and the Special Customs Invoice submitted with the entry state that the filling in the subject merchandise consists of 80 percent down and 20 percent feathers, an independent laboratory analysis of the size M garment revealed that the filling thereof consisted of 67 percent down (*i.e.*, down and down fiber) and 33 percent feathers; this laboratory analysis also substantiated the manufacturer's statement that the size M garment contained a down and feather filling weighing 5 ounces. For the purpose of this memorandum in determining the total costs attributable to the filling portion, the relative percentages of down and feathers disclosed in the laboratory analysis of the size M garment shall be used for all five sizes of the subject merchandise; however, the total weight of

the filling for each size garment and the per ounce costs of the down and of the feathers, as reported in the submitted manufacturer's Certificate, shall be used in making this determination.

Further, the costs incurred in washing, sterilizing, and blowing the down and feathers, as reported in the Certificate, shall be included in determining the costs attributable to the filling; in this regard the initiator has advised us by telephone that these three costs refer to manufacturing processes performed prior to, and separate from, the process of inserting the filling in the nylon fabric body of the finished garments. Accordingly, the total cost attributable to the down an feather filling portion in each of the five sizes appears to be as follows:

XS	*S*	*M*	*L*	*XL*
$2.04	2.18	2.27	2.40	2.49

The issue presented is whether the merchandise in question is in chief value of the feathers and down so as to be classifiable under the provision for articles not specially provided for, of feathers, in item 748.40, Tariff Schedules of the United States (TSUS), as claimed by the initiator, or whether the merchandise in question is in chief value of textile materials so as to be classifiable as other wearing apparel of textile materials within Subpart F of Part 6, Schedule 3, TSUS. In regard to the computation of the total costs attributable to the textile portion of the merchandise, the initiator states, and we agree, that the following costs are includable therein: 1) the $.65 per yard cost of the down proof nylon taffeta used to make the down bag (shell) of each garment, including the pockets, a hanger loop, and a tab used to hold a metal D-ring; 2) the $.05 per garment piecegood cutting cost; 3) the $.07 sewing cost of the down bag of each garment, *i.e.*, the sewing of three sides of several four-sided panels prior to insertion of the feathers and down into the down bag; 4) the $.10 cost for four rayon labels on each garment; 5) the $.01 label sewing cost attributable to each garment; 6) the $.04 sewing cost of the pockets for each garment which are sewn on two of the panels prior to assembly of the down bag with the feathers and down; and 7) the $.08 per garment cost for sewing thread which, although described in the Special Customs Invoice and by the initiator as being cotton, has been determined by laboratory analysis to be nylon. It is assumed in connection with the above that the cost of sewing the labels, as in the case of the pockets, was incurred as part of the constrcution of one or more of the separate fabric panels but prior to the final assembly of the down bag with the feathers and down. It is also assumed that the cost of sewing each hanger loop ($.008) and each fabric D-ring tab ($.015) was incurred during or after the final assembly of the

down bag with the feathers and down so as to not be attributable solely to the costs of the textile portion of the subject merchandise.

Each garment also contains a metal D-ring ($. 02 per garment), a paper stiffener along the pocket hem ($. 01 per garment), a "Pellon" material ($. 02 per garment), and a zipper ($.25 per garment). With regard to the "Pellon" material, it is our understanding that "Pellon" is a trade name for nonwoven textiles used for shaping purposes in the inner construction of garments and that "Pellon" is made from natural and/or man-made fibers placed at random and then bonded together by chemicals and heat; in the absence of any information to the contrary, it is assumed that the "Pellon" used in the subject merchandise consists of man-made fibers. With respect to the zipper, the Special Customs Invoice and the initiator state that the textile portion thereof consists of cotton valued at $.13 per garment; however, a laboratory analysis of the zipper indicates that the textile portion consists of 56.4 percent cotton and 43.6 percent nylon by weight. For the purpose of this memorandum and in the absence of any more specific information requiring a different allocation, we shall consider the cotton portion of the zipper to be valued at $.07 per garment and the nylon portion of the zipper to be valued at $.06 per garment.

It is the initiator's principal contention that the "Pellon," the metal D-ring, and the zipper "are each of relatively small cost and cannot enter into the component material of chief value determination." Noting both that the D-ring is composed of a material other than either feathers or textiles and that the cost of this item is very small when compared to the costs attributable to either the textile portion or the feather portion of the subject merchandise, we agree that the metal D-ring has no bearing on the component material of chief value issue involved in the present case; we also believe the same considerations apply to the paper stiffener used in the pocket hem on each garment. However, we do not believe it follows that the textile components of the "Pellon" material and zipper should be disregarded in determining whether the subject merchandise is in chief value of textile materials as opposed to feathers.

The initiator specifically states with respect to the zipper that although it contains a textile component (in addition to plastic), this textile component should not be considered in determining the total textile material cost since zippers are specifically provided for under the provision for slide fasteners in item 745.70, TSUS. It is the initiator's opinion that once the plastic and textile materials were processed into the zipper, they were no longer identifiable as plastic and textile materials but rather became identifiable as a zipper in commercial and tariff parlance; thus, the initiator states that it was from zippers,

and not plastic or textile material, that the merchandise in question was made. In support of its contentions the initiator cites *Valentina, Ltd.* v, *United States*, 65 Cust. Ct. 19, C.D. 4046 (1970) and *Venetianaire Corp. of America* v. *United States*, 66 Cust. Ct. 125, C.D. 4180 (1971). *Valentina* involved the tariff classification of ladies' sweaters with spangles which were composed of platsic and which were the component material of chief value in the sweaters. After noting that spangles' are complete commercial entities having an independent existence as an article of commerce apart from the plastic material out of which they are made, the court held that the sweaters at issue did not represent "wearing apparel of plastic" but rather were properly classifiable as "articles of spangles." In this regard the court stated as follows at page 21:

> In short, when the plastic material was manufactured into spangles, it was then known in trade and commerce not as plastic but rather as spangles. In this connection, the principle is basic that once a material is so manufactured or processed that it becomes something else that is recognized in the trade and given a specific tariff status by name, the article for tariff purposes is no longer the material that it was prior to manufacture or processing. See e.g., *Tide Water Oil Company* v. *United States*, 171 U.S. 210 (1898). Applying that principle here, when the plastic material was processed into spangles, the importation was no longer described for tariff purposes under item 772.30 as wearing apparel of plastic but was described under the tariff provision for articles of spangles—i.e., item 741.50.

In *Venetianaire* the court held that plastic bead window curtains, in chief value of the beads which were composed entirely of plastic, were classifiable under the provision for articles not specially provided for, of beads, in item 741.50, TSUS, rather than under the provision for curtains of plastics in item 772.35, TSUS. In so holding, the court stated that the *Valentina* case, *supra*, was dispositive of the issue, and the court quoted with approval the above language from that earlier case.

It is recognized that the *Valentina* and *Venetianaire* cases, *supra*, involved merchandise which consisted in significant part of a material (plastic) which had been processed into new articles of commerce having a complete and independent commercial existence (*i.e.*, spangles and beads, respectively). However, it should also be noted both that those spangles or beads were the component material of chief value in the merchandise at issue and that the court in each of those cases opted for a classification under a specific provision for articles not specially provided for "of beads, . . . of spangles . . ." in item 741.50, TSUS. In the present case the merchandise at issue is

not in chief value of the zippers, and neither of the conflicting tariff schedule provisions involved herein specifically covers merchandise "of zippers." Accordingly, the rationale of the *Valentina* and *Venetainaire* cases, *supra*, is not applicable to the present case notwithstanding the fact that zippers or "slide fasteners," by themselves, may have a distinct identity for commercial or tariff purposes. However, the decision in *Swiss Manufactures Association, Inc. and Rohner, Gehrig & Co., Inc., et. al.* v. *United States*, 39 Cust. Ct. 227, C.D. 1933 (1957), is relevant to the issue raised by the initiator. In that case the court in discussing the meaning of the terms "product," "article," "component material," and "component," stated as follows at page 232;

> While all of the terms referred to are of rather broad import, nevertheless, we think that the last two have somewhat different meanings. The following may serve to illustrate this: An engine would be a component of an automobile, but it would hardly be referred as a component *material*. A component material of an automobile would refer to more primary or basic things, such as steel, rubber, etc. (Emphasis in the original).

Therefore, the cotton and nylon textile portion of the zipper is a primary or basic "component material" of the merchandise in question and must be included in the total textile component material cost in order to determine whether or not the vests are in chief value of textile materials. For the same reasons the man-made textile portion of the "Pellon" material must be included in the total textile component material cost in making this determination.

Accordingly, the total cost attributable to the textile portion in each of the five garments appears to be as follows:

XS	*S*	*M*	*L*	*XL*
$2.35	2.40	2.45	2.50	2.60

The total cost attributable to the textile component material in the subject merchandise exceeds the total cost attributable to the down and feather component material by the following amount for each size garment: $.31(XS), $.22(S), $.18(M), $.10(L), and $.11(XL). Therefore, the subject merchandise in each case is in chief value of textile materials and is covered by Subpart F of Part 6, Schedule 3, TSUS, noting Headnote 1 of that Subpart. Further, since the textile material in each garment consists entirely of man-made fiber with the exception of the cotton portion of the zipper, and noting that the $.07 per garment cost attributed to that cotton portion is in each case less than the difference between the total cost of the textile portion and the total cost of the feather and down portion, we must conclude that each of the garments in question is in chief value of man-made fibers.

Based on the above, the described unisex merchandise is classifiable under the provision for other women's, girls', or infants' wearing apparel, not ornamented, of man-made fibers, not knit, in item 382.81, TSUS, with duty at the rate of 25 cents per pound plus 27.5 percent ad valorem.

A copy of this memorandum may be furnished to the initiator.

(Signed) JAMES W. O'NEIL
for SALVATORE E. CARAMAGNO

(T.D. 78-188)

Classification: Concrete building forms

Oct. 3, 1977
FILE: CLA-2:R:CV:MA
053293 JB

TO: District Director of Customs
Ogdensburg, New York 13669

FROM: Director, Classification and Value Division

SUBJECT: Classification of concrete building forms.
Internal Advice 105/77

The merchandise consists of modular concrete forms comprised of two 4 foot by 8 foot steel panels, two end pieces, and the hardware necessary to connect the panels and the end pieces. A number of these individual forms are used together in the construction of a large concrete structure such as a wall or the face of a dam.

Concrete building forms generally are classifiable as molds for mineral materials, other, under item 680.15, Tariff Schedules of the United States (TSUS).

The submitted issue is whether the item 680.15, TSUS, provisions for molds includes incomplete building forms as parts of molds. Item 680.15, TSUS, does not provide for parts of molds.

The principle is well settled that an eo nomine provision does not include parts if parts are not specified. *Harry A. Wess, Inc.* v. *United States*, C.D. 4706 (1977). *Pacific Fast Mail* v. *United States*, 68 Cust. Ct. 41, C.D. 4333 (1972).

However, we take the position that each individual module, i.e., two 4 foot by 8 foot panels with two end pieces and hardware, is a mold. Each one of these molds should be classifiable as molds for mineral materials, under item 680.15, TSUS, even if a sufficient number of these molds are not imported to form a complete concrete structure.

(Signed) A. P. SCHIFFLIN
for SALVATORE E. CARAMAGNO

(T.D. 78–189)

Classification: Woven cotton fabric laminated with plastic and used as wall covering

Oct. 11, 1977
FILE:CLA-2:R:CV:MC
053294 PR

TO: District Director of Customs
Buffalo, New York 14202

FROM: Director, Classification and Value Division

SUBJECT: Request for Internal Advice No. 94/77 concerning the classification of wall covering material

The subject internal advice request concerns the tariff classification of merchandise referred to as vinyl wall coverings. The merchandise is a product of Canada. It consists of a woven cotton fabric that has been laminated on one side with nontransparent plastics material.

The customhouse broker representing the importer has stated that the merchandise is imported in 5 yard rolls. We understand that this information is incorrect. The merchandise is actually shipped in lengths of 90 to 100 yards and in widths of 27 inches. In the United States the merchandise is either cut into 5 yard lengths and packaged for retail sale, or cut into 20 inch by 20 inch sizes and inserted into sample books.

The merchandise is not classifiable under the provision for wall coverings, not specially provided for, of rubber or plastics, in item 772.70, Tariff Schedules of the United States (TSUS), for the following reasons.

The legislative history of item 772.70 clearly shows that provision was not intended to cover the instant merchandise. The Tariff Classification Study, Explanatory and Background Materials, Schedule 7, dated November 15, 1960, at page 453, states, "this item would not include wall coverings made of paper or textile materials coated with a rubber or plastic material." While we recognize that the Tariff Classification Study refers to coated fabrics, and that the instant merchandise is a laminated fabric, we perceive no real distinction between these two types of merchandise in this area and interpret that language as being equally applicable to laminated fabrics.

Furthermore, in accordance with Headnote 4(b), Schedule 3, TSUS, nontextile laminating substances are disregarded in determining the component fiber of chief value in laminated fabrics and articles wholly or in part thereof. Also, the express wording of the superior heading governing items 355.65–85, TSUS, provides for *woven fabrics, of textile materials*, laminated with rubber or plastics material.

Therefore, the value of the plastics laminating material is not considered in determining the proper tariff classification applicable to this type of merchandise and as a result the merchandise is not "of rubber or plastics materials."

Accordingly, the instant merchandise is classifiable under the provision for woven cotton fabrics, laminated with plastics, in item 355.65, TSUS. A copy of this memorandum may be furnished to the inquirer.

(Signed) J. W. O'NEIL
for SALVATORE E. CARAMAGNO

(T.D. 78–190)

Classification: Denim jeans with manufacturer's label attached.

DATE: Oct. 11, 1977
FILE: CLA-2:R:CV:MC
052881 PR

TO: District Director of Customs
Houston, Texas 77052

FROM: Director, Classification and Value Division

SUBJECT: Request for Internal Advice No. 104/77, concerning the tariff classification of jeans with labels

The subject internal advice request was initiated by (names), and concerns the tariff classification of denim jeans with manufacturer's labels attached.

Two samples were submitted. Both are labeled to be products of Hong Kong and to be wholly of cotton. One sample is labeled article No. 16–52–21, lot E7703. It is a man's pair of denim jeans and has a front zippered fly with a metal button closure, two front slash pockets, belt loops on the waist band, and two rear patch pockets. The rearmost belt loops form an "X". The rear pockets are formed by various pieces of fabrics stitched together to form a design. There are two manufacturer's labels on the garment that are rectangular shaped and made of woven fabric. One is located on the waistband directly above the right rear pocket. It measures approximately 1¼ inches by 3⅛ inches and contains the letters "atb" on a white background. The "a" and the "b" are red while the "t" is blue. The upper leg portion of the "b" is missing so that the "a" and the "b" look almost like the mirror images of each other. The cross piece on the "t" touches both adjoining letters. The vertical portions of all the letters are made to appear wider

in proportion to their size than the horizontal portions. The label has a thin blue border set in slightly from the exterior edges. The second label is located at the top of the right rear pocket and measures approximately 7/16 inches by 1 15/16 inches. It is the same as the larger label except that it does not have the thin blue border. On both labels, the "b" is not readily recognizable.

The second sample has no style number. It is also a man's pair of denim jeans and has with a front zippered fly with metal button closure, a waistband with belt loops, two rear patch pockets, and 6 front slash pockets. The back pockets each have a basket weave insert and a welted pocket opening approximately 1¼ inches below the top of the patch. The front pockets are arranged in sets of three. The primary pocket on each front side is the normal curved front slash-type pocket found on most jeans. Within the curve of each of the main front pockets there are two other pocket openings, one within the other. The 3 pocket openings look like 3 concentric arcs. The 2 smaller pockets are shallower and are suitable for carrying change or small articles. On the waistband above the right rear pocket is a label identical to the waistband label found on the first sample.

Textile fabric is one of the forms of ornamentation specifically mentioned in Headnote 3, Schedule 3, Tariff Schedules of the United States (TSUS). Accordingly, textile fabric which is applied to a garment in a location where that fabric would normally be visible during the usual wear of the garment will constitute ornamentation for tariff purposes if that fabric decorates, embellishes, adorns, or enhances the appearance of the garment. See *Blairmoor Knitwear Corp.* v. *United States*, 50 Cust. Ct. 338, C.D. 3396 (1968). Since the three letters on the labels in question are stylized and are arranged to attract the viewer's attention, the label which is attached to the top of the pocket of the first described sample constitutes ornamentation. The labels which are attached to waistbands that are designed to be worn with belts would probably not be visible when the garments are worn and, therefore, do not constitute ornamentation purposes.

The size of a label, by itself, is not normally determinative of whether that label is ornamentation for tariff purposes. However, an otherwise plain label which is excessively large in size might constitute ornamentation for tariff purposes.

The addition of a registration number or the name of the country of origin on a label would not prevent that label from being considered ornamentation if the label enhances, adorns, embellishes, or decorates the garment on which is attached.

The inquirer has also requested information on whether the addition of rivets to a garment would cause that garment to be considered

ornamented for tariff purposes. Without a sample of the merchandise, we are unable to determine the tariff status of that merchandise with certainty. However, if the rivets added to the garment are the normal functional type of rivets, they would probably not cause the garment ment to be classified as ornamented even though they are on the garment for a primarily decorative purpose.

Of the two submitted samples, only the first described sample should be classified as ornamented. A copy of this memorandum may be furnished to the inquirer.

(Signed) J. W. O'NEIL
for SALVATORE E. CARAMAGNO

(T.D. 78-191)

Classification: "Golf" and "tennis" dresses with crocheted edging

DATE: Oct. 11, 1977
FILE: CLA-2:R:CV:MC
053160 PR

TO: District Director of Customs
Los Angeles, California 90731

FROM: Director, Classification and Value Division

SUBJECT: Request for Internal Advice No. 122/77, concerning the tariff classification of two women's garments

The subject internal advice request concerns the tariff classification of two garments which are labeled to be golf and tennis dresses.

Two questions are presented concerning the subject merchandise. The first is whether each garment is classifiable under the ornamented provisions of the tariff schedules. The second is whether the garments are dresses for textile quota category purposes. This latter issue is not one which is the proper subject of an internal advice request since it must be decided by our Office of Operations. Accordingly, the file and samples have been forwarded to the Office of Operations for a direct reply on the proper quota category applicable to those garments.

The "tennis dress" is machine knitted with acrylic yarn. It is a short length sleeveless garment with 2 inch wide shoulder straps. A crocheted edging extends around the neck opening, around each of the arm holes, and along the entire bottom hem. The edging can be removed without injurying the remainder of the garment or affecting its integrity.

Edging is one of the forms of ornamentation listed in Headnote Schedule 3, Tariff Schedules of the United States (TSUS). That headnote also provides that edging shall not be required to have had a separate existence from the article on which it appears in order to constitute ornamentation. Accordingly, the edging on the garment, which primarily serves to enhance the appearance of that garment, constitutes ornamentation for tariff purposes, and the garment is classifiable under the provision for women's or girls' ornamented wearing apparel, of man-made fibers, in item 382.04, TSUS.

The second sample, is indicated to be a "golf dress". It is knit and labeled to be 51 percent acrylic and 49 percent cotton. The garment is also short length, sleeveless, and has a V-neck. As with the first sample, there is a crocheted edging around the arm holes, the neck opening, and the bottom hem. This crocheted edging can be removed without damaging the dress. As with the prior sample, we believe that the edgings serve to primarily enhance the appearance of the garment and, accordingly, the sample is classifiable under the ornamented wearing apparel provisions, in either item 382.00, TSUS, if in chief value of cotton, or in item 382.04, TSUS, if in chief value of man-made fibers.

Another issue present but not raised in whether this last garment, the "golf dress," is a lace garment. There is a substantial amount of openwork in decorative patterns contained in the fabric comprising the garment. It has been suggested that the amount of openwork and the delicacy of the fabric are not sufficient for that fabric to be regarded as lace.

Lace is an openwork fabric with a preconceived inwrought design. In the instant sample, the openwork is substantial and covers the entire fabric. There are numerous kinds of types of laces. Some laces are more delicate than others. Some laces, such as certain Bobbin laces, which are created by use of a braiding principle are not considered to be of fine texture. This is not to say that all fabrics with openwork designs constitute lace. There is a point where a fabric becomes too heavy to be considered lace, however, we do not believe that point has been reached with the instant merchandise. Accordingly, in the absence of an established and uniform practice to the contrary, the "golf dress" is considered a lace article and is classifiable under the provisions for women's or girls' lace wearing apparel, whether or not ornamented, in item 382.00, TSUS, if in chief value of cotton, or, if in chief value of man-made fibers, in item 382.04, TSUS.

A copy of this memorandum may be furnished to the inquirer.

(Signed) SALVATORE E. CARAMAGNO

(T.D. 78-192)

Classification: Merchandise dedicated to making of a boring and turning machine

DATE: Oct. 12, 1977
FILE: CLA-2: R: CV: MA
053166 HL

To: District Director of Customs
Chicago, Illinois 60607

FROM: Director, Classification and Value Division

SUBJECT: Internal Advice Request No. 107-77, whether the subject merchandise constitutes an unfinished machine or parts thereof

This is in reply to your request for internal advice dated June 23, 1977, on behalf of an importer, (name) of certain merchandise manufactured by (name), in Italy.

Submitted documents, including a confirmation order sent by the manufacturer to the importer and an office memorandum of the importer dated April 26, 1976, indicated that the subject merchandise as imported consists basically of base and column, table and ram housing. It is shipped less hydraulic electrical and electronic components. After importation, the importer will add all motors, an electrical cabinet, a numerical control unit with push button panel, a hydraulic unit with its valves panel, inductosyn scales and sliders, and electrical and hydraulic equipment.

The issue presented is whether the subject merchandise constitutes an unfinished machine, as the importer contends, or merely parts of a machine. If the former, the merchandise would be classifiable under the provision for boring, drilling, and milling machines, including vertical turret lathes, in item 674.32, Tariff Schedules of the United States (TSUS), with duty at the rate of 6 percent ad valorem; if the latter, it would be classifiable under the provision for other parts of machine tools in item 674.53, TSUS, with duty at the rate of 7 percent ad valorem.

The importer cites General Interpretative Headnote 10(h), TSUS, which states that "a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished." The importer relies upon *F. W. Meyers & Co. Inc.* v. *United States*, C.A.D. 982, 57 CCPA 87, 425 F. 2d 78 (1970), which quoted the rule in *American Import Co.* v. *United States*, T.D. 49612, 26 CCPA 72 (1938) as follows: "a thing may be classified . . . under an *eo nomine* provision for the article unfinished if that thing has been

so far processed towards its ultimate completed form as to be dedicated to the making of that article or that class of articles alone." Based upon this language, the importer contends that the subject merchandise is so far advanced to completion as to be an unfinished boring and turning machine.

It is agreed that the merchandise as imported is so far advanced in form as to be dedicated to the making of a boring and turning machine. Notwithstanding, the Court of Customs and Patent Appeals warned in *Authentic Furniture Products, Inc.* v. *United States*, C.A.D. 1109, 61 CCPA 5 (1973), that the "adoption of a naked 'dedication to use' test would effectively eliminate competing parts provisions." Thus, the court held that "parts of an article may be classified as the unfinished article itself only when the imported pieces constitute *a substantially complete article*, albeit in unassembled condition." (emphasis added)

In Headquarters letter of May 18, 1977, file No. 049557 LXL, it was held that the lack of electricals, electrical cabinet, and electric motors, did not preclude an unfinished lathe from being classified as an other machine tool in item 674.35, TSUS. In the present case, however, we are faced not only with the lack of electricals, but also the lack of a hydraulic system, numerical control unit, and other features. Without a hydraulic system, which relates to the clamping and unclamping operation of a complete machine, the merchandise is inoperable as a boring and turning machine, and could not be sold as such to an end user. Absent only electricals, it could be sold as such. According to the submitted documents, approximately one fourth of the listed value of the basic machine is deducted for parts and labor not furnished. The majority of that value appears to pertain to the omission of the hydraulics.

In conclusion, the subject merchandise in its imported condition is a mere metal carcass. That Congress enacted a provision for machine tool parts seems to indicate that it did not intend for such substantially incomplete articles to be included in the provision for machines. The subject merchandise is therefore classifible under the provision for parts of machine tools in item 674.53, TSUS, with duty at the rate of 7 percent ad valorem.

The issue of valuation raised by the importer will be the subject of a separate letter. You should inform the inquirer of this ruling and may provide him with a copy.

(Signed) A. P. SCHIFFLIN
for SALVATORE E. CARAMAGNO

(T.D. 78–193)

Classification: Glitter or braided hanging cord as "ornamentation"

DATE: Oct. 14, 1977
FILE: CLA–2:R:CV:MC
052990 LCS

TO: District Director of Customs
Honolulu, Hawaii 96806

FROM: Director, Classification and Value Division

SUBJECT: Request for Internal Advice, No. 109/77

This is in reply to your memorandum (CLA–2–DCV) of July 13, 1977, forwarding a request for internal advice submitted on behalf of the importer, concerning whether a minimal amount of glitter applied to the surface of a textile scroll-type wall hanging constitutes ornamentation within the meaning of Headnote 3 (a)(iv), Schedule 3, Tariff Schedules of the United States (TSUS).

Additionally, although not raised by the importer, you requested our opinion concerning whether the braid hanging cord constitutes ornamentation within the meaning of Headnote 3 (a)(iii), Schedule 3, TSUS.

The scroll itself is composed of a panel of woven rayon fabric (which we assume is the component in chief value), measuring approximately 32 x 11½ inches, two black plastic, dowel-type, cylindrical rods, measuring approximately 13 inches in length, which are slotted along their entire length, these slots gripping the textile panel and being tightly closed thereon by virtue of brass-colored metal caps which fit tightly over the ends of the hollow plastic rods, and a braided hanging cord at the top of the uppermost rod, secured thereto by the end caps. On the back of the textile panel there is a small tag, measuring approximately 1 x ⅜ inches, which identifies the article as "RN 19935" (apparently a stock or style number), "100 percent rayon," and "made in Japan." The surface of the textile panel is flocked, giving it a velvet-like appearance, and has been painted with the words "HAWAII" and "THE 50*TH* STATE," and various pictorial representations, including a stylized outline map of the major islands and various symbols associated therewith. On extremely close visual examination, a minimal small amount of glitter may be observed on the face of the sample textile scroll.

The importer's representative believes that the presence of the glitter on the scroll, however minute in quantity, constitutes ornamentation within the meaning and intent of the above-cited headnote

and that, accordingly, the textile scroll wall hanging is properly classifiable under the provision for other ornamented furnishings of man-made fibers in item 365.86, TSUS, dutiable as a product of Japan at the reduced column 1 rate of duty of 21 percent ad valorem. It is your position, supported by the concerned national import specialist in New York that the glitter present on this article is so scantily applied as to be insignificant and, therefore, does not constitute ornamentation within the meaning and intent of the above-cited headnote and that, accordingly, the merchandise is properly classifiable under the provision for other furnishings, not ornamented, of man-made fibers in item 367.60, TSUS, dutiable as a product of Japan at the reduced column 1 rate of duty of 25 cents per pound plus 17 percent ad valorem.

That glitter is an ornament within the scope of the nontextile forms specifically provided for in the above-cited headnote (". . . beads, bugles, spangles, bullions, or ornaments . . .") is unquestioned. ORR Rulings 73-0425, February 8, 1974, CLA-2:R:CV:MC PR, 471.33, 030958, December 21, 1973; T.D. 73-71, R:CV:MC 473.4 PR, 004777, March 8, 1973; MCB 492.122 CM, 020609, July 24, 1972. However, the fact that glitter is a form of ornamentation, in and of itself, is not finally dispositive of the issue as to whether that form actually ornaments the textile fabric or textile article to which applied.

The scope of the term "ornamented" has been defined for purposes of Headnote 3(a), Schedule 3, TSUS, as encompassing only those forms of ornamentation which primarily serve to adorn, embellish, decorate, or enhance the textile fabric or textile article to which affixed. *Blairmoor Knitwear Corp., Leading Forwarders Inc.* v. *United States*, 60 Cust. Ct. 338, C.D. 3396 (1968). Further, the courts have ruled that, in order to ornament a textile fabric or article, the forms or types of ornamentation specified *must, in fact, ornament* the fabric, rather than primarily serve a utilitarian purpose; nor may "ornamentation" as applied to a textile fabric or textile article be concealed or insignificant commercially. In addition to being affixed with a form of ornamentation specified, the resultant textile fabric or textile article must be considered "ornamented" in the acceptable trade sense and the mere addition of the specified form of ornamentation to a fabric or article does not convert it *per se* into a ornamented fabric or article for tariff purposes. *Rifkin Textiles Corp.* v. *United States;* 55 Cust. Ct. 341, C.D. 2600 (1965); and 62 Cust. Ct. 316, C.D. 3752 (1969).

It is apparent from these decisions that, in order to render a textile fabric or textile article ornamented for tariff purposes, onee a deter-

mination has been made that a particular form of ornamentation is provided for and present, a further determination on a case-by-case basis must be made to ascertain the ultimate effect of the applied form of ornamentation on the end product.

The particular glitter at issue in this case has been applied to the textile scroll wall hanging in such a sparse quantity that it is virtually unnoticeable. Only by visually aided examination (magnification) or by positioning the scroll at various angles with respect to a fixed light source is the presence of the glitter apparent and, even then, insignificant. Therefore, albeit a necessarily subjective determination, we do not believe that the minimal amount of glitter involved increases the eye appeal of the article, or adorns, embellishes, decorates, or enhances the article, or effects a commercially significant difference than if the glitter had not been applied at all.

As to the braided hanging cord, any decorative effect provided thereby is completly outweighed by its principle utilitarian function (*i.e.*, effecting a means by which a scroll may be hung).

Accordingly, we agree with your proposed classification under the provision for other furnishings, not ornamented of man-made fibers, other than of knit or pile or tufted construction, and other than made of glass, in item 367.60, TSUS, dutiable as a product of Japan at the reduced column 1 rate of duty of 25 cents per pound plus 17 percent ad valorem.

(Signed) J. W. O'NEIL
for SALVATORE E. CARANAGNO

(T.D. 78–194)

Classification: *Woman's pullover sweater with braided belt*

DATE: Oct. 14, 1977
FILE: CLA–2:R:CV:MC
053570 PR

TO: Area Director of Customs
New York Seaport
New York, New York 10048

FROM: Director, Classification and Value Division

SUBJECT: Request for Internal Advice No. 155/77, concerning the tariff classification of a woman's sweater

The subject internal advice request concerns the tariff classification of a woman's pullover sweater knitted with man-made fiber yarns. It has belt loops through which a braided belt runs. The belt is made

up of 3 strands of tubular knitted yarns. These strands are knotted on each end of the belt and extend loose from the knot approximately 1½ inches.

We have previously ruled that a belt constructed in a very similar manner to the instant belt had fringed ends and therefore was ornamented for tariff purposes. We have examined the sample and have concluded that the primary purpose of having the loose hanging ends on the belt is to impart a decorative effect to that belt.

The belt matches the predominant color in the sweater and we assume that the two are imported together and sold as a unit together. Accordingly, they are classifiable as an entirety for tariff purposes.

The set is classifiable under the provision for other women's or girls' ornamented wearing apparel of man-made fibers, in item 382.04, Tariff Schedules of the United States, with duty at the rate of 42.5 percent ad valorem.

A copy of this memorandum may be furnished to the inquirer.

(Signed) JAMES W. O'NEIL
for SALVATORE E. CARAMAGNO

(T.D. 78-195)

Classification: Coats made of leather and textile marerials

DATE: OCT. 14, 1977
FILE: CLA-2:R:CV:MC
052683 PR

TO: District Director of Customs
St. Louis, Missouri 63105

FROM: Director, Classification and Value Division

SUBJECT: Request for Internal Advice No. 74/77, concerning the tariff classification of coats

The subject internal advice request concerns merchandise produced in England and imported by (name). The sole issue to be determined is whether the merchandise is in chief value of textile materials and, if so, which textile material, or if it is in chief value of leather.

A detailed and comprehensive submisssion has been made by the importer showing that the merchandise is in chief value of leather. Classification of the merchandise as being in chief value of textile materials is contended on the basis that (1) the price that the manufacturer states it paid for the leather is inflated, and (2) the manufacturer has overstated the amount of leather that is lost during cutting.

In regard to the price of the leather, the importer has indicated that the price of 42 pence (about 92 cents) per square foot, which has been used throughout their calculations in determining component material of chief value, was actually the lowest price paid for leather in 1976 and that if a weighted average price was used, that price would more nearly be 44 pence. According to our National Import Specialist at the port of New York, considering the quality of the leather used, 92 cents per square foot is reasonable.

In regard to the issue of waste, an industry source was contacted and stated in a letter that generally 10 percent of each skin is lost or wasted in cutting leather. However, when that same source was contacted by a member of Headquarters, he indicated that his information was derived from other people in the business and that he was not certain whether that 10 percent figure covered all scraps from cutting or only nonrecoverable waste.

In *C. R. Bard, Inc.* v. *United States*, 2 Cust. Ct. 244, C.D. 134 (1939), it was stated that in ascertaining the component material of chief value in merchandise, the proper values of the separate parts of the article shall be the *actual* cost to the manufacturer. Only their true value was considered. We further note that the United States Supreme Court ruled in *Seeberger* v. *Hardy*, 150 U.S. 420 (1893), "While it may be true that to a certain extent the Government may be at the mercy of the importer's witnesses in estimating the value of the labor put upon the raw material as goes into the completed article, this difficulty cannot be allowed to defeat the plan object of the enactment." We interpret that statement to mean that where a cost breakdown of the component materials in an article is submitted to the Customs Service, that cost breakdown must be accepted as accurate unless (1) the cost breakdown is incomplete, (2) the Custom Service has evidence in its possession that the cost breakdown is erroneous, or (3) the cost breakdown is so patently unaccurate on its face that Customs officers have both reason and cause to look to other reasonable factors in determining the component material of chief value. In this instance, none of the above criteria is present.

A Foreign investigation concerning this merchandise was conducted. The Report of Investigation (Customs Form 23), dated January 15, 1976, contains the following statements:

> Having viewed the pattern-placing/leather-cutting operation at the exporter's premises, the undersigned can state that a good deal of

waste actually occurs. The 17 or 18 feet (square feet) stated on the value breakdowns for some styles are probable (sic) in line with reality.
It is noted by the undersigned that the longer coats (the 43″ lengths) have a greater quantity (21 square feet) of leather shown in the cost breakdowns than do the shorter coats—the 26″, 29″ and 33″ lengths.
The undersigned has no reason to further question the exporter relative to the amount of leather being used in his exported garments.

While the figures for waste may appear to be high, we have no evidence which proves those figures to be false or erroneous. On the contrary, evidence developed by Customs appears to support the manufacturer's contentions concerning the amount of leather lost during the manufacture of the subject garments.

The importer indicates that no leather is recovered from the scrap waste material except for some trimmings which are included on the cost breakdowns. Since there is no evidence to rebut this contention, the *possibility* that some of the leather scrap could still be used is not here involved.

For the sake of the record, we wish to point out that the costs of taping and lamination in the cost breakdowns submitted by the manufacturer have been attributed entirely to the leather components. Since these processes involve the combining of other materials with leather, the cost of those materials should not have been attributed to the leather and the cost of the joining or the actual processing incurred should have been prorated among the materials involved. However, in view of the small amount of value which these processes added to the leather and the fact that the value of the leather on all the submitted cost breakdowns greatly exceeded the combined values of all the textile materials, we do not believe that obtaining a furthe cost breakdown from the manufacturer would change the results.

Accordingly, based on the available information, the subject garments for which cost breakdowns were submitted should be classified as being in chief value of leather. A copy of this memorandum may be furnished to the inquirer.

(Signed) SALVATORE E. CARAMAGNO

(T.D. 78–196)

Classification: Swiss Army shirt

DATE: Oct. 18, 1977
FILE: CLA–2:R:CV:MC
053164 PR

TO: Area Director, John F. Kennedy International Airport
New York, New York 11430

FROM: Director, Classification and Value Division

SUBJECT: Request For Internal Advice No. 108/77, concerning the tariff classification of a Swiss Army shirt

The subject Internal Advice Request was initiated by (*name*) and concerns the tariff classification of a garment commonly referred to as a Swiss Army shirt.

The submitted two samples are women's long sleeve shirts made of woven cotton and polyester fabrics. They are solid colored and are, except for color, identical. Each has a full front buttoned opening with placket, double buttoned sleeve cuffs, a pointed collar, two front chest area patch pockets with flaps secured by single buttons, a smaller but similar patch pocket located directly below the left breast pocket, fabric tabs approximately 4 inches in length and 1½ inches in width on each sleeve with corresponding buttons on the inside of each sleeve to enable the wearer to use these tabs to hold the rolled up sleeves in place, epaulets secured with single buttons on the shoulder areas, a straight back yoke, and an expandible box pleat that runs from the center of the back yoke to the bottom of the shirt. Pairs of X-shaped stitches hold the box pleat in place both at the top of the pleat by the yoke seam and in the waist area.

The issue presented is whether the merchandise is ornamented for tariff purposes because of the epaulets. You have indicated that similar merchandise has been imported at your port and classified as not ornamented on the basis of a prior ruling by this office, dated December 9, 1975, file 042689, in which a similar Swiss Army shirt with epaulets was ruled not ornamented for tariff purposes.

Headquarters ruled on January 12, 1976, file 043018, that a multicolored Swiss Army shirt with epaulets was ornamented only because it was not made from a material of a single color. We also note that Internal Advice Request No. 40/76, file 045516, dated July 23, 1976, concerned a "Swiss Army shirt" with epaulets, a straight hemmed bottom, and which was to be imported "in various colors and patterns." In ruling that the merchandise was ornamented for tariff purposes, the statement was made that we do not possess "evidence

that military style shirts or blouses (excluding camouflage clothing) are constructed from fabric of more than a single color or are constructed in any manner other than including shirt tails."

Our ruling of December 9 has not been revoked or modified by the subsequent rulings and is, therefore, still in effect. Since that ruling concerned merchandise virtually identical to the merchandise which is the subject of this Internal Advice Request, we believe our ruling on the instant merchandise must be in conformance with that prior ruling. Accordingly, the submitted samples are classifiable under the provisions for other women's or girls' wearing apparel, not ornamented, in either item 382.33, Tariff Schedules of the United States (TSUS), if in chief value of cotton, or in item 382.81, TSUS, if in chief value of man-made fibers.

A copy of this memorandum may be furnished to the inquirer. The samples are being returned under separate cover.

(Signed) JAMES W. O'NEIL
for SALVATORE E. CARAMAGNO

(T.D. 78–197)

Classification: Hat bodies; Substantial transformation

DATE: Oct. 19, 1977
FILE: CLA–2:R:CV:MA
053234 c

Area Director of Customs
New York Seaport
New York, New York 10048

Director, Classification and Value Division

Internal Advice Request No. 139/77, concerning country of origin of woven straw headwear

This is in reply to your request for internal advice as to the country of origin for tariff classification purposes of certain straw headwear. This request was initiated in a letter dated March 14, 1977, from (name A) New York, New York, on behalf of their client, (name B) New York, New York.

Raw hat bodies of woven straw produced in Mainland China have been shipped to countries whose products are entitled to the column 1 rates of duty for further processing prior to their importation into the United States. The issue presented is whether the processing performed in the third countries to the raw hat bodies effected a substantial transformation so as to entitle the finished headwear to the column 1 rates of duty upon importation.

The country of origin of any product means the country of manufacture, production or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the country of origin for purposes of classification under the Tariff Schedules of the United States (TSUS). For an article to be considered substantially transformed, it must undergo a manufacturing operation which results in the emergence of a new and different article having a distinctive name, character, or use, different from that originally possessed by the original material of article.

This office has previously stated that "for a hat body produced in Communist China to be considered a product of a second foreign country, it is necessary that 3 separate processing steps be performed on that hat in the second country. A hat body manufactured in Communist China will remain a product of Communist China for tariff classification purposes unless the hat is processed by any combination of 3 processing steps, such as dyeing, blocking, trimming or adding a sweatband, in a second foreign country before the hat is imported into the United States."

With respect to style No. 9705, Mr. B points out that starting with a Chinese hat body the following processing steps were performed in Italy: blocking, cutting down the size of the brim, stitching the edge, sewing braid to it, and placing a trimming around the crown. In the headwear trade the operations of cutting down the size of the brim, stitching the edge, and sewing braid to it are considered trimming operations. This style No. 9705 has been subject to two processing steps namely blocking and trimming. Inasmuch as this style has been subjected to only two processing steps in Italy, we do not consider it to have been substantially transformed so as to render it a product of Italy for Customs purposes.

With respect to style No. 1473, Mr. B states that starting with a Chinese hat body the following processing steps were performed in the country of exportation; blocking, cutting down the size of the brim, turning the cut edge under, stitching it, and trimming the hat with a rubbon around the crown. Cutting down the size of the brim, turning the cut edge under, and stitching it are considered trimming steps. All trimmings performed on the hat in the country of exportation is considered a single processing step and thus the hat remains a product of Mainland China for tariff purposes.

Styles Nos. 9965 and 9855 are made of raffia braid imported from Madagascar. They are blocked and each is trimmed with a hat body.

It is believed that the raffia braid was sewn into hat form in Italy and on this basis the hats are considered products of Italy for tariff purposes.

Style No. 1713/C was originally a hat body from Mainland China. It was blocked. The edge of the brim was cut and a braid was stitched around the edge of the hat. The hat was reblocked. Finally, a braid trimming was placed around the crown. Blocking and reblocking accomplish the process of blocking and together constitute one processing step. Likewise cutting the edge of the brim and stitching a braid around the edge of the hat accomplish the process of trimming which is one processing step. It is our view that this style remains a product of Mainland China because only two processing steps have been completed in the country of exportation.

Style Nos. 1161 and 1472 were originally hat bodies from Mainland China. They were blocked. The edges of the hats were bounded. Ribbons were placed around the crowns. Bounding the edges and placing ribbons around the crowns accomplished the processing step of trimming. These hats being only trimmed and blocked are considered to be of Chinese origin for tariff purposes.

Style No. 1703/T was originally a hat body from Mainland China. It was blocked. The edge of the brim was cut to reduce the size of the hat and the resulting edge was bounded. The hat was reblocked. A trimming was placed around the crown. The blocking and reblocking together constitute the processing step of blocking. Cutting the edge, bounding it and placing a trimming around the crown together constitute the processing step of trimming. This hat is considered a product of Mainland China because only two processing steps are believed to have been accomplished in the country of exportation.

Style No. 1168 was made from two separate hat bodies orginating in Mainland China. Each hat body was blocked separately and then the two were reblocked together one on top of the other to form one hat. Rows of braid were sewn to the edge. A ribbon band constituting a sweat band was sewn inside the hat. Inasmuch as three processing steps have been accomplished in Italy the hat is considered to be a product of that country for tariff purposes.

Style No. 2161 was made from a hat body of Mainland China origin using the same processing steps that were applied to style No. 1713/C and like style No. 1713/C is considered to be of Chinese origin for tariff purposes.

A copy of this memorandum may be furnished to the initiator.

(Signed) A. P. SCHIFFLIN
(*for*) SALVATORE E. CARAMAGNO

(T.D. 78–198)

Classification: Chain units designed for automobile or truck tires

DATE: Oct. 27, 1977
FILE: CLA–2:R:CV:MA
053844 JB

To: District Director of Customs
Seattle, Washington 98714

FROM: Director, Classification and Value Division

SUBJECT: Classification of "Snap-on Snow Chains" for tires.
Internal Advice 130–77.

The merchandise consists of chain units which are designed to be fitted onto automobile or truck tires to provide additional traction in snow and other hazardous road conditions.

Each unit includes two pre-cut lengths of chain, with a hook at each of the ends. The chains are the traction producing elements of the chain units and are held in place on the tread width of the tire by aluminum lock assemblies and plastic side plates. These assemblies and plates stretch the chains tightly across the tire.

The submitted issue is whether such chain units are classifiable as chain and chains, and parts thereof, under items 652.12–652.38, Tariff Schedules of the United States (TSUS), or whether such chain units are in chief value of the attaching devices and fittings, and thereby classifiable as articles of iron or steel, under item 657.20, TSUS.

Tire skid chains, although equipped with ancillary devices or fittings, have been held to be chains. *C. J. Tower and Sons* v. *United States*, 70 Cust. Ct. 251, C.D. 4460 (1973). ORR ruling 840.70, September 10, 1970. It is noted that the chains in question are commonly and commercially referred to as "anti-skid" or "traction" chains or "snow chains" and feature a fastening device.

Brussels provision, section XV, 73.29, which provides for chains and parts thereof, of iron and steel, classifies chains therein whether or not fitted with terminal parts or accessories. It only excludes chains fitted with articles when the chains play a subsidiary role in the article's function. Clearly, the chains here play an essential and primary role. The function of the tire chain is to provided added traction. This function is accomplished via the chain while the fastening device is subsidiary in supporting to the friction feature.

An eo nomine designation, without limitation or a shown contrary legislative intent, judicial decision, or administrative practice and without proof of commercial designation, will include all forms of an article. *Crosse and Blackwell* v. *United States*, 36 CCPA 33, C.A.D.

393 (1948). Therefore, these chain units would be classifiable as chain and chains, and parts thereof, under items 652.12–652.38, TSUS, depending on size and component material of the chains.

(Signed) A. P. SCHIFFLIN
for SALVATORE E. CARAMAGNO

(T.D. 78–199)

Entry Procedures: Refunds for lost or missing merchandise in case lots and less than case lots

DATE: Oct. 31, 1977
FILE: LIQ 8–0 R:E:E
305047 K

Acting Regional Director
of Customs (I&C)
Baltimore, Maryland 21202

Dear Sir:

This refers to your memorandum of August 22, 1977, requesting internal advice on procedures for obtaining a refund of duties on shortages of merchandise. You note that certain provisions in Part 158 of the regulations (relating to refunds for lost or missing merchandise) and Parts 173 and 174 of the regulations (relating respectively to correction of errors under section 520(c)(1), Tariff Act of 1930, as amended and protest procedures) are not cross-referenced in any way, and you ask whether, for purposes of securing a refund of duties subsequent to entry a CF 5931 must be accompanied by a protest under section 514 of the tariff act, or a petition under section 520(c)(1).

Sections 158.3 and 158.5 of the regulations provide, respectively, that submission for case lot and less than case lot shortages must be made before the liquidation becomes final. As you know, a liquidation becomes final under section 514 of the tariff act unless a timely protest is filed or a timely claim is submitted under section 520(c)(1).

In applying these provisions to your question we will first discuss case lot (unconcealed) shortages, and then discuss less than case lot (concealed) shortages.

Ordinarily, a shortage involving missing cases or packages will be apparent to both the carrier and the consignee at the time the goods are "permitted," and the procedures described in section 158.3 of the regulations will be followed. A properly executed CF 5931 will be required as a condition precedent to obtaining an allowance of duties in the liquidation of the entry. When that form is submitted within

90 days after liquidation, the appropriate allowance in duties is made at the time of liquidation, under section 159.8 of the regulations, and no protest is required.

If the consignee failed to file a properly executed CF 5931 within 90 days after the date of liquidation, his claim for an allowance in duties for a shortage cannot be considered unless he filed a timely, acceptable protest. In that case, the liquidation would not be considered to be final under section 514 of the tariff act, and the consignee should be afforded an opportunity to present the required CF 5931 and whatever additional evidence the district director might need to satisfy himself as to the validity of the claim.

Section 174.28 of the regulations permits a reviewing officer to consider alternative claims and additional grounds or arguments submitted at any time prior to the disposition of the protest.

On rare occasions, a consignee who failed to file a CF 5931 or a protest before the liquidation became final might find that an unconcealed shortage involving a missing case or package was not brought to the attention of Customs before the entry was liquidated or the liquidation became final. In that case, if he can establish to the satisfaction of the district director that the failure to file a timely CF 5931 was due to an inadvertence or mistake of fact, within the meaning of section 520(c)(1), and if he calls the matter to the attention of Customs within the time limits of that provision, a reliquidation of the entry and a refund of duties would be appropriate.

Where, in such cases, a CF 5931 covering the shortage had been executed by the carrier and the consignee, Customs should require the form to be submitted. Under no circumstances, however, should consignees be permitted to repeatedly fail to file CFs 5931 before the liquidation of entries becomes final, or to deliberately neglect to file protests under section 514 in favor of the later filing of a petition for relief under section 520(c)(1).

Where a shortage of less than a case lot (concealed shortage) is discovered before liquidation, or before the liquidation has become final, the consignee must file a Form 5931 as provided in section 158.5 of the regulations. As noted above, the liquidation will not be considered as final if a timely protest was filed under section 514 of the tariff act.

If the consignee discovers a concealed shortage after liquidation of the entry has become final, relief under section 520(c)(1) will be appropriate if the district director is satisfied that the shortage claim is genuine and the petition for relief meets the requirements of section 520(c)(1). In such a situation, the district director may require that a Form 5931, executed by the consignee, be submitted with the

petition for relief, but the filing of the form could not be made a condition precedent for relief where the fact of a shortage had been brought to the attention of the Customs Service by the petition itself, or by an earlier communication. In this connection, bear in mind that a concealed shortage does not require a correction of the manifest, and a Form 5931 does not have the importance to the Quantity Control Program that it has in connection with an unconcealed shortage involving one or more complete packages.

If you have any specific problem, not covered by this discussion, we will be glad to offer further comments. To assure uniform interpretation, we are distributing copies of this ruling to all ports.

Sincerely yours,
(Signed) EDWARD B. GABLE
for HARVEY B. FOX
Director, Entry Procedures
and Penalties Division

(T.D. 78–200)

Classification: Pile lined coats with folded strips of pile material in yoke seams

DATE: Nov. 7, 1977
FILE: CLA-2:R:CV:MC
046355 PR

Dear (Name):

This is in reply to your letter of June 15, 1976, in which you ask for reconsideration or our ruling, Internal Advice Request No. 15/76, dated April 2, 1976. In that ruling it was determined that a man's pile-lined coat was ornamented for tariff purposes because of the presence of folded strips of textile pile material, approximately one and a quarter inches in width, that had been inserted in the front yoke seams. You contend that our ruling is in conflict with a uniform and established practice tc classify such coats as not ornamented for tariff purposes.

In order to determine the validity of your claim of the existence of a practice, we have obtained reports from most of our district directors. The District Director, Pembina, has advised that prior to the issuance of Internal Advice No. 15/76, it had been the practice in that district to classify the subject coats as not ornamented. However, the district directors at Ogdensburg, El Paso, and Miami, have informed us that

it has been their practice to classify coats that match the description of the garment which was the subject of Internal Advice Request No. 15/76 as ornamented. Further, the Area Director, New York Seaport, has advised that their records do not indicate any entries of this merchandise at the port of New York prior to July 29, 1975. However, between July 29, 1975 and October 30, 1975, New York Seaport did have seven entries of the subject merchandise (Style No. 703), with a total value of $133,385, which were classified and liquidated as ornamented cotton wearing apparel.

Based on the above and on the other submitted reports, we have determined that no uniform and established practice or classification existed with regard to the subject merchandise. Accordingly, we adhere to the ruling contained in Internal Advice Request No. 15/76.

Sincerely yours,
(Signed) JAMES W. O'NEAL
SALVATORE E. CARAMAGNO
For Director
Classification and Value Division

(T.D. 78–201)

Exemptions for resident crewmembers: When applicable

DATE: Nov. 16, 1977
FILE: BAG 3–01 R:E:E
304698 W

Area Director of Customs
J.F.K. International Airport
Seaboard World Airlines Building 178
Jamaica, New York 11430

Dear Sir:

This is in reference to a memorandum of September 8, 1977, from (name) in which he seeks internal advice clarifying the circumstances under which a resident crewmember returning to the United States may be entitled to the exemption provided for by item 813.30–31 of the Tariff Schedules of the United States. Specifically, he asks whether the crewmember is entitled to this particular exemption if he is assigned on his next trip to a domestic flight or if he must be permanently assigned on future flights to domestic rather then international flights. Mr. (name) cites section 148.65(a)(1) of the Customs Regulations, which grants the exemption to a crewmember if he permanently leaves the carrier without the intention of resuming

employment on any carrier engaged in international traffic. However, he suggests that there is an apparent conflict between section 148.65(a)(1) and ORR Ruling 75 0107, Bureau File BAG 3–01 R:E:E 302289 B, dated April 18, 1975, where the opinion states:

> ". . . If the air crewmembers presents satisfactory evidence to the examining Customs officer that the carrier has assigned him on his next trip to routes limited to Interstate Air Commerce, he may claim entitlement to the $100 residents' duty exemption . . ."

We do not believe that the above-quoted language is inconsistent with section 148.65(a)(1). Although that section applies to aircraft crewmembers, section 148.65(a)(2) does not, and the ORR ruling which is referred to was issued to cover the situation posed by the latter section in the case of aircraft crewmembers. If the crewmember's next assigned flight is a domestic flight, the crewmember, pursuant to section 148.65(a)(1), may claim entitlement to the exemption in item 813.30–31, provided that he permanently leaves his arriving aircraft and does not then intend to resume employment at a later time on any aircraft engaged in international traffic. The problem posed by section 148.65(a)(1) is, therefore, largely one of intent. However, we note the restriction in item 813.30–31, that a person claiming the exemption may not have claimed an exemption under that same item within the 30 days immediately preceeding his arrival.

Section 148.65(a)(2) covers the situation where a crewmember is *not* permanently leaving a vessel, but the vessel (or another vessel to which he is assigned) is leaving international traffic and entering United States domestic trade. Under such circumstances, it has always been held that while the crewmember has not "permanently" left that or another carrier, he should be treated as a returning resident because he will now stay in the United States for the foreseeable future (on the vessel or another in U.S. waters). A U.S. vessel moving from port to port in United States waters with no foreign residue cargo, or cargo being picked up for export, is not required to report to Customs for entry of the vessel, as contemplated by section 148.65(a)(2).

Since the provisions of section 148.65(a)(2) did not cover aircraft, the April 18, 1975, ruling was issued. In effect, the ruling provides that if the aircraft crewmember remains on the aircraft or transfers to an aircraft which is to proceed to another port in the United States in a movement in which Customs control of the aircraft will not be required, he is to be considered a returning resident.

"Customs control" of an aircraft moving between airports in the United States is covered by section 6.2(d) of the Customs Regulations, which requires a permit to proceed, as a means of Customs control,

for foreign-registered aircraft (6.2(d)(1)) and for foreign-built aircraft registered in the United States that have not been imported (6.2(d)(3)(ii)). A permit is *not* required if the aircraft is of domestic origin and domestic registration, and all passengers and cargo have received Customs treatment at a prior airport in the United States (6.2(d)(3)), nor is a permit to proceed required for a foreign-built aircraft registered in the United States which has been entered as an imported article and where duty on it has been paid on a previous arrival (6.2(d)(3)(i)).

Sincerely yours,
(Signed) HARVEY B. FOX
Director, Entry Procedures
and Penalties Division

U.S. Customs Service

General Notice

Customhouse Brokers

Notice of Rescheduling of October 1978 Customhouse Broker's Examination

AGENCY: U.S. Customs Service, Treasury Department

ACTION: Changing date of Customhouse Brokers Examination

SUMMARY: Pursuant to 111.13(b) of the Customs Regulations (19 CFR 111.13(b)), the October 1978 examination for a Customhouse broker's license would normally be scheduled to be given at each district office on October 2, 1978, the first Monday in October. Because of the observance of the Jewish Holiday of Rosh Hashanah however, the October 1978 Customhouse broker's license examination has been rescheduled to Thursday, October 5, 1978. All Customs districts will be notified to reschedule the examination accordingly.

EFFECTIVE DATE:—June 22, 1978.

FOR FURTHER INFORMATION CONTACT: William Easdale, Operations Officer, Planning, Resource Utilization and Evaluation Branch, Duty Assessment Division, Office of Operations, United States Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 (202–566–8235).

LEONARD LEHMAN
Acting Commissioner of Customs.

[Published in the FEDERAL REGISTER June 22, 1978 (43 FR 26814)]

Recent Unpublished Customs Service Decisions

The following listing of recent administrative decisions issued by the Office of Regulations and Rulings, U.S. Customs Service, and not otherwise published, is published for the information of Customs officers and the importing community. Although the decisions are not of sufficient general interest to warrant publication as Treasury Decisions, the listing describes the issues involved and is intended to aid Customs

officers and concerned members of the public in identifying matters of interest which recently have been considered by the Office of Regulations and Rulings.

A copy of any decision included in this listing, identified by its date and file number, may be obtained in a form appropriate for public distribution upon written request to the Office of Regulations and Rulings, Attention: Legal Reference Area, Room 2404, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. These copies will be made available at a cost to the requester $0.10 per page. However, the Customs Service will waive this charge if the total number of pages copied is 10 or less.

Dated: 20 Jun 1978.

LEONARD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

DATE OF DECISION	FILE NUMBER	ISSUE
6/7/78	054980	GSP treatment: primary batteries not separately invoiced
6/6/78	055526	Substantial transformation of machine parts for GSP purposes
6/7/78	055555	Substantial transformation of unstamped PVC for SSP purposes
6/6/78	055556	GSP treatment: carbide die sets
5/26/78	045027	Classification: breadboard models
5/30/78	049597	Classification: children's blue denim love knot sandal
5/5/78	053875	Classification: hand hydraulic cable cutter
5/1/78	054410	Classification: rugby balls
6/6/78	054609	Classification: laser scanner, DP voice recognition system, high speed digital facsimile
5/1/78	054676	Classification: magnesium reject castings
5/22/78	054964	Classification: miniature wooden angels
6/2/78	054990	Classification: mobile cranes and boring, excavating and lifting machines
5/22/78	055000	Classification: parts of watchband
5/17/78	055002	Valuation: pump-style shoe; ASP
5/22/78	056022	Classification: thermalite igniter cord
5/17/78	056024	Classification: truck-tractor
5/5/78	056046	Classification: toys and games
5/4/78	056084	Classification: laminated plastic sheet
6/5/78	056147	Classification: polypropylene tubing stamped into a weaved pattern
6/5/78	056174	Classification: roofing materials
5/3/78	056229	Classification: steel welding fastener

DATE OF DECISION	FILE NUMBER	ISSUE
5/23/78	056240	Classification: corn husk mice: copyright protection
6/5/78	056261	Classification: plastic tiles and base plates
5/5/78	056264	Classification: bowling pins
5/1/78	056270	Classification: textile processing machine
5/4/78	056283	Classification: copper cooling device for thyristons and diodes
5/2/78	056287	Classification: aluminum roofing panels, screws, and nails
5/23/78	056309	Classification: linear ball bearings with flat ways
5/23/78	056311	Classification: various graphic arts machines
5/2/78	056314	Classification: metal and laminated paper cutter
5/8/78	056379	Country of origin marking: coil steel
5/10/78	056381	Classification: corn husk dolls
5/25/78	056382	Classification: cap pistol on a key chain; "cut finger"
5/22/78	056389	Classification: "Miracle Brush" for clothing
5/26/78	056400	Classification: chill cast iron rolls; calendering rolls
5/2/78	056416	Classification: tractor sealed beam lamps
6/6/78	056432	Classification: wooden coin box and animal craft pocket kit
5/25/78	056438	Classification: alloy steel wire
5/22/78	056441	Classification: aluminum decorative tiles
5/25/78	056464	Classification: doll clothing, accessories and wigs
5/2/78	056465	Classification: hang gliders
6/5/78	056499	Classification: air cleaners, clean benches, and clean rooms (for controlled environments)
6/6/78	056524	Classification: automatic liquid inks storage and mixing system
5/5/78	056529	Classification: hydraulic concrete breaker
5/25/78	056537	Classification: down-filled jackets
6/5/78	056542	Classification: nickel-bearing residue
5/25/78	056544	Classification: rubber soccer doll on a key chain
5/22/78	056545	Country of origin marking: nylon knit gloves
5/26/78	056552	Classification and country of origin marking: steel lids
6/5/78	056574	Classification: special effects contact printer and compound table
5/8/78	056576	Classification: pocket flashlight with rechargeable battery
5/11/78	056583	Classification: offshore drilling rig
5/2/78	056584	Classification: fiberglass insulation; acoustical screens
5/8/78	056585	Classification: steel hex bolts
5/25/78	056586	Classification: steel rods, washers, and hexagon nuts
5/9/78	056587	Classification: vibrating-roller compacting machine
5/4/78	056590	Classification: canvas sling
5/22/78	056592	Classification: motorized lifting machine; steel honeycomb racks and cradles
5/22/78	056595	Classification: texturing spindlette
6/5/78	056596	Classification: beaded Christmas tree garland
5/26/78	056597	Country of origin marking: nylon knit gloves

DATE OF DECISION	FILE NUMBER	ISSUE
5/3/78	056607	Classification: down-filled foot warmers
5/24/78	056648	Classification: blast cleaning machines
5/25/78	056659	Classification: lead acid storage batteries
5/26/78	056666	Classification: plastic sheets on a cardboard backing
5/25/78	056668	Classification: water taste purifier and filtering unit
5/23/78	056671	Classification: plastic sheets
5/24/78	056675	Classification: chewing stick and bone; dog grooming brush
6/1/78	056687	Classification: engine valves
5/25/78	056691	Classification: floating dry dock
6/5/78	056730	Classification: electric sheet metal bending machines and prefabricated timber houses

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1209)

KURT ORBAN CO., INC. v. THE UNITED STATES, No. 7723 (—F. 2d—)

1. VALUATION – EXPORT VALUE

Customs Court judgment, 78 Cust. Ct. 122, C.D. 4697, 432 F. Supp. 198 (1977), overruling importer's claim that charges for loading the merchandise in Japan "from Barge onto Vessel" bound for the United States should not be included in the export value, *reversed.*

2. ID.

Ocean freight charges do not constitute part of the export value of merchandise.

3. ID.

Neither the type vessel used for exportation (conference or chartered) nor the method of invoicing should be determinative of whether loading charges are includible in the export value.

4. ID. – OFFERED PRICE – EXPORT VALUE

Any charges, costs, or expenses accruing subsequent to the time the merchandise is in the principal market "in condition, packed ready for shipment to the United States," even though included in the offered price, are not ordinarily part of the export value for tariff purposes.

5. ID. – LOADING CHARGES

Loading charges, like ocean freight charges, are not part of the export value.

6. ID. – FREELY SOLD OR OFFERED FOR SALE

Following the rationale of *United States* v. *Josef Manufacturing, Ltd.*, 59 CCPA 146, C.A.D. 1057, 460 F. 2d 1097 (1972), the disputed loading charges are to be deducted whether or not the goods were freely sold or, in the absence of sales, offered for sale at a price without the loading charges.

United States Court of Customs and Patent Appeals, June 15, 1978

Appeal from United States Customs Court

[Reversed.]

Samuel Frankel, attorney of record, for appellant.
Barbara Allen Babcock, Assistant Attorney General, *David M. Cohen*, Chief, Customs Section, *Saul Davis* for the United States.

[Oral argument on April 3, 1978 by Samuel Frankel for appellant and by Saul Davis for appellee]

Before MARKEY, Chief Judge, RICH, BALDWIN, LANE, and MILLER, Associate Judges.

MILLER, Judge.

[1] This appeal is from the judgment of the United States Customs Court in *Kurt Orban Co.* v. *United States*, 78 Cust. Ct. 122, C.D. 4697, 432 F. Supp. 198 (1977). The parties agree that appraisement of the merchandise was properly based on export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, 19 USC 1401a(b).[1] The issue is the propriety of the Government's inclusion of charges for loading the merchandise in Japan "from Barge onto Vessel" bound for the United States in determining the export value here involved. The Customs Court held that such inclusion was proper. We reverse.

Facts

The merchandise consists of steel bars exported from Kobe, Japan on August 28, 1969, and entered at the port of Detroit, Michigan on October 17, 1969. The steel bars were sold to appellant by Nissho-Iwai Co., Ltd., through its American subsidiary (Nissho) at various C. & F. Detroit [2] prices. On each special customs invoice (Customs Form 5515),

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[1] 19 USC 1401a(b) reads:

(b) For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

[2] The term "C. & F." means that the sale price includes in a lump sum, "cost" of the goods and "freight" to the named destination. The term "C.I.F." indicates that the price covers cost, insurance, and freight. The term "F.A.S." means alongside ship; hence, an F.A.S. price is that of the goods delivered in good order to the dock from where the ship is to sail.

the overseas transportation charges for the merchandise were broken down rather than shown as a single total, thus:

Element of Transportation Expense	Entry 128466	Entry 128467
(a) Ocean freight (free in, free out)	$511.02	$4038.89
(b) Loading charge in Japan from barge onto vessel	119.24	942.21
(c) Estimated discharging cost from vessel to pier in Detroit	174.77	1381.30
(d) Survey and tally fees	17.03	134.63
(e) Other various charges (insurance, agency fee, etc.)	13.63	107.70

The appraisements were made by the appraising officer on a per se, or unitary, basis by adopting the C. & F. Detroit prices minus allowances for the invoiced cost of ocean carrying and unloading charges (items (a) and (c) above).[3] Appellant contends that further allowance should have been made for items (b), (d), and (e).[4]

Opinion Below

Relying principally upon *Plywood & Door Northern Corp.* v. *United States*, 62 Cust. Ct. 1044, A.R.D. 256, 304 F. Supp. 1030 (1969), the Customs Court concluded that the loading charges are akin to inland freight charges since they "*accrue in the foreign country prior to shipment to the United States*" and are "not charges which accrued subsequent to exportation of the merchandise." Accordingly, it held that the loading charges, like inland freight charges, when constituting "an integral part of the purchase price," are part of the dutiable value of the merchandise. It noted that there is no evidence of actual sales, or of offers of sale, of such or similar merchandise at the claimed F.A.S. prices, exclusive of the disputed loading charges.[5] The Customs Court

[3] On the face of each special customs invoice, the appraiser initialed and wrote "ND" (nondutiable) next to items (a) and (c) and subtracted their total from the C. & F. price.

[4] The parties have not separately argued the deduction of the "survey and tally fees" and the "other various charges (insurance, agency fee, etc.)"; nor did the Customs Court treat them separately from the loading charges in Japan. Accordingly, all such charges will be presumed to stand or fall together.

[5] The Customs Court found that during the pertinent period ("on or about August 1969"), appellant did not purchase steel bars from any Japanese trading house on terms other than C. & F. or C.I.F. port of entry. Moreover, during this period, Nissho did not sell steel bars for export to the United States on an F.O.B. or F.A.S. basis, but only on C. & F. or C.I.F. terms pursuant to its customers' requests.

further noted that mere willingness to sell on any trade terms is insufficient when there are no sales at the claimed F.A.S. prices exclusive of the disputed loading charges. The Customs Court also rejected appellant's argument that the appraisement was separable with respect to the disputed charges.

OPINION

[2] Ocean freight charges have long been held not to constitute part of the export value of merchandise. *United States* v. *Samuel Shapiro & Co.*, 65 Treas. Dec. 1650, R.D. 3268 (1934); *John Shillito Co.* v. *United States*, 5 Treas. Dec. 555, T.D. 23851 (1902); *accord*, *Josef Manufacturing, Ltd.* v. *United States*, 62 Cust. Ct. 763, 767, R.D. 11616, 294 F. Supp. 956, 959 (1969), *aff'd*, 64 Cust. Ct. 865, A.R.D. 274, 314 F. Supp. 51 (1970), *aff'd*, 59 CCPA 146, C.A.D. 1057, 460 F. 2d 1079 (1972). It is also well settled that inland freight charges are part of the export value only where the merchandise is offered for sale at an F.O.B. price or a price which includes the inland freight charge, and never where the sale is at an ex-factory price. *Albert Mottola* v. *United States*, 46 CCPA 17, C.A.D. 689 (1958); *United States* v. *Paul A. Straub & Co.*, 41 CCPA 209, C.A.D. 553, *cert. denied*, 348 U.S. 823 (1954). Therefore, the dispositive question is whether the disputed loading charges are to be identified with ocean freight charges and excluded from export value or with inland freight charges, which may or may not be part of the export value. Only if the loading charges should be identified with inland freight charges would it be necessary to consider whether the merchandise was freely sold or, in the absence of sales, offered for sale at a price without the disputed charges.[6]

A. Trade Practices

Mr. J. F. Gibson, vice president of the Retla Steamship Company, which ships steel from Japan to the United States, testified [7] that on "conference" vessels a quotation for ocean freight charges is in "berth terms," [8] which include in a single figure the combined charges of loading, ocean carriage, and unloading, plus related "minor things." This single figure is used on bills of lading and invoices since the loading, carrying, and unloading is paid by the shipper. However, if the shipment is by a charter or nonconference vessel, the price is usually

[6] *Compare United States* v. *Josef Mfg., Ltd.*, 59 CCPA 146, C.A.D. 1057, 460 F. 2d 1079 (1972), where the court said that even when the merchandise is only sold at a C.I.F. price—including in one lump sum the cost of the goods, insurance, and freight to the named destination—the cost of the insurance and freight must be deducted from the C.I.F. price to obtain "the price . . . of the merchandise undergoing appraisement."

[7] Similar testimony was given by Mr. Masayoshi Homma of Nissho.

[8] This is the same as "liner terms."

quoted in "free in, free out" terms, under which the cost of each component of the total freight charge—loading, carrying, and unloading—is itemized. This is because the charter shipper only presents the ship for loading and unloading at the respective ports.

Uncontested testimony below indicates that if the shipping freight charges are stated as a single dollar amount, the uniform practice of the Customs Service is to deduct the entire amount. Thus, the Customs Court's decision would have this anomalous result: for shipments on conference vessels (which use berth terms), the total freight charge (including loading) would be deducted in calculating export value; but, for shipments on nonconference vessels (which use free in, free out terms), the loading charge would not be deducted. Nevertheless, regardless of the type or ownership of the vessel used for exportation, the importer ultimately bears the cost of all freight charges including loading.[9] This court in *United States* v. *Josef Manufacturing, Ltd*,. 59 CCPA at 150, 460 F. 2d at 1082, stated that the freight charges from the principal market in the country of exportation "should be treated in the same fashion" regardless of the mode of transportation. **[3]** Thus, whether the vessel used for exportation is a conference or a chartered vessel should not be determinative of the treatment of the ocean freight charges; more particularly, it should not be determinative of whether the loading charges are included in the export value of the merchandise.[10]

We note from the testimony below that in the common parlance of importers and marine carriers, ocean freight includes loading as well as transportation and unloading.[11]

B. Case Law

While section 402(b) makes no mention of deductions, it is clear that the value contemplated is the per se price of the goods in the principal market of the country of exportation, inclusive of the cost of packing and other expenses incidental to the placing of the goods in a condition for shipment.[12] [4] Any charges, costs, or expenses accruing *subsequent* to the time the merchandise is in the principal market "in condition, packed ready for shipment to the United States," even though included in the offered price, are not ordinarily part of the

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[9] The contract notes between appellant and Nissho indicate that charges for the entire freight package are to be treated as adjustable up or down; thus, the appellant bore the cost of any price increases.

[10] Nor should the method of invoicing be determinative of the dutiable value. Appellant observes that "[e]ven in free in—free out shipments the three components could be totalled and expressed as a sum."

[11] We further note that it appears from the record not to be unusual for the Customs Service to deduct loading charges in making an appraisement. *See Ontario Stone Corp.* v. *United States*, 65 Cust Ct. 753, 757, R.D. 11727, 319 F. Supp. 923, 926 (1970), where the loading charges were deducted (finding No. 3).

[12] *Josef Mfg., Ltd.* v. *United States*, 62 Cust. Ct. 763, R.D. 11616, 294 F. Supp. 956 (1969), *aff'd*, 64 Cust. Ct. 865, A.R.D. 274, 314 F. Supp. 51 (1970), *aff'd*, 59 CCPA 146, C.A.D. 1057, 460 F. 2d 1079 (1972).

export value for tariff purposes.[13] *A.W. Fenton Co.* v. *United States*, 61 Cust. Ct. 437, 446, R.D. 11556, *application for review dismissed*, 61 Cust. Ct. 613, A.R.D. 246 (1968); *United States* v. *International Commercial Co.*, 28 Cust. Ct. 629, 636, R.D. 8112 (App. Term 1952). Accordingly, ocean freight has been determined not to be part of the export value because it accrues subsequent to the time the merchandise is in the principal market in condition ready for shipment.[14] *John A. Steer & Co.* v. *United States*, 30 Cust. Ct. 504, R.D. 8196 (1953), cited with approval in *United States* v. *Paul A Straub & Co.*, *supra*; *United States* v. *Samuel Shapiro & Co.*, *supra*.

The rationale of the Customs Court's decision that loading charges are includable in dutiable value is that these charges accrue within the country of exportation prior to shipment to the United States. Although the Government cites several cases for the proposition that "loading charges and/or pier charges were held to be part of the export value of the merchandise," [15] only one case, *Plywood & Door Northern Corp.* v. *United States*, *supra*, which was relied upon by the trial court, merits detailed discussion. After distinguishing the dutiable treatment of ocean freight and inland freight charges, the Customs Court, *supra* at 1047, 304 F. Supp. at 1033, concluded:

> Accordingly, it is not significant that charges (inland freight or loading) may "accrue" after the merchandise has been packed ready for shipment to the United States and has left the principal market.
>
> Indeed, the inland freight included in the unit values of the plywood involved in this case is conceded by appellant to be dutiable. Hence, as in *Straub* and *Mottola*, the important consideration here is that the price at which the merchandise was freely offered for sale in the principal market always included the disputed charge, and not that the loading charges accrued after the merchandise had left the principal market, viz., Helsinki.

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[13] The few deviations from this general proposition are easily distinguishable. In *Schieffelin & Co.* v. *United States*, 62 CCPA 7, C.A.D. 1135, 504 F. 2d 1147 (1974), and *Erb & Gray Scientific, Inc.* v. *United States*, 53 CCPA 46, C.A.D. 875 (1966), the disputed charges involved were services (advertising of the product in the United States and necessary service and installation of the product, respectively) bargained for and inextricably bound to the goods; whereas in the present case, the disputed charges are inextricably bound to transportation, discussed *infra*.

[14] It is also not a cost or charge of the kind described in the statute. *John Shillito Co.* v. *United States*, *supra* at 566.

[15] We find unpersuasive the Government's citation to *Bud Berman Sportswear, Inc.* v. *United States*, 60 CCPA 34, C.A.D. 1077, 469 F. 2d 1107 (1972), and *Louis Goldey Co.* v. *United States*, 55 Cust. Ct. 759, A.R.D. 196 (1965), inasmuch as the question whether loading charges are part of the export value was not addressed. Indeed, it is not at all clear that loading charges were included in the disputed charges. The decision in *Reliance Trading Corp. of Illinois (Elder)* v. *United States*, 53 Cust. Ct 352, R.D. 10785 (1964), went off on burden of proof. *American Commercial Inc.* v. *United States*, 40 Cust. Ct. 690, R.D. 9072 (1958), is unhelpful since the conclusion of the single judge of the Customs Court that lighterage from dockside to the vessel was not deductible in determining export value, simply rested on his statement that "When costs are included in price, there is no provision for subtracting them, or any of them, in order to arrive at export value." *Id.* at 692. This is clearly wrong since ocean freight and unloading charges must be excluded.

> Additionally, since loading charges like other "inland charges" accrue in the foreign country prior to shipment to the United States, they are not deductible from the c.i.f. selling price in determining export value on the basis of the principle invoked with respect to ocean freight, which of course accrues subsequent to exportation.

Although the opinion contains little analysis, apparently the court's rationale was that loading charges are like inland freight because they (1) accrue after the merchandise has been packed ready for shipment, and *"additionally,"* (2) accrue in the foreign country prior to shipment to the United States. There are several weaknesses in this reasoning.[16]

Ocean freight and unloading charges obviously meet the first condition (accrue after the merchandise is packed); yet they are not dutiable and are treated differently from inland freight charges. The "additional" condition (accrues in the foreign country prior to shipment[17]), which was particularly emphasized by the Customs Court in this case, ignores the fact that the loading process is an essential step in the ocean transportation service. Moving the merchandise from a barge to a vessel *bound for the United States* necessarily occurs subsequent to arrival of the merchandise in the principal market of the country of exportation, packed ready for shipment (which is the reason that ocean freight is not dutiable). The loading charges accrue necessarily and directly as a result of exportation.[18]

[5] In view of the foregoing, we hold that the disputed loading charges here, like ocean freight charges, are not part of the export value of the goods. To do otherwise would not only be contrary to the general parlance of the shipping trade, but would make the nature of the carrying vessel (conference or charter) determinative of export value.

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[16] In all fairness to the Customs Court, the significance of the different treatment between ocean freight and inland freight charges where the price always includes the disputed charge (which was the situation in *Plywood*) may not have been appreciated since the opinion predates this court's decision in *United States* v. *Josef Mfg., Ltd., supra*, albeit subsequent to the Customs Court's decision in that case.

[17] This language apparently comes from *United States* v. *Heyman Co.*, 50 Cust. Ct. 564, A.R.D. 157 (1963), which suggests that ocean freight is not part of the export value since it accrues subsequent to the time the merchandise leaves the foreign shores. However, the exact point in time (*e.g.*, after made ready for shipment, or in the principal market and made ready for shipment, or immediately after being loaded, or after the boat leaves the harbor) was not critical to the *Heyman* decision, and the court did not attempt to precisely determine the cutoff point. Also, we note that the two cases cited in *Heyman* (*United States* v. *New England Foil Corp.*, 10 Cust. Ct. 596, 597, R.D. 5856 (1943), and *United States* v. *F. C. Gerlach & Co.*, 7 Cust. Ct. 494, 504, R.D. 5445 (1941)) do *not* denominate the test as "accrues subsequent to the time the merchandise is exported from the foreign shore."

[18] Once the cargo is placed on a vessel bound for the United States, it would have to be unloaded, at additional expense, in order to be available for use in the exporting country (either for use domestically or for alternative exportation). *Movement from a barge to shipboard is consistent only with exportation.* Packing and inland freight charges, on the other hand, usually add to the economic value of the goods in the country of exportation. A subsequent change in the destination country or a use for consumption in the exporting country ordinarily would not negate the value of such charges.

[6] The disputed loading charges are to be deducted whether or not the goods were freely sold or, in the absence of sales, offered for sale at a price without the loading charges. *See* note 6, *supra*, and accompanying text. Therefore, the proof needed to establish the amount of these charges for appropriate reduction in the appraised value is the same as that required for the ocean freight carrying and unloading charges, Since the charges on the special customs invoices have not been questioned, and since the appraiser accepted the values listed on these invoices for the ocean freight carrying and unloading charges, the value of the loading charges stated thereon should be accepted.[19]

The judgment of the Customs Court is *reversed*.

MARKEY, Chief Judge, dissenting.

I agree that loading charges should be non-dutiable. However, the value of merchandise is determinable on the evidence of record and adduced at trial. 28 U.S.C. 2635(c). I would affirm the decision below because the Customs Court's conclusion that plaintiff failed to carry its burden of proof on the issue of separability is correct. That conclusion is fully supported by the evidence and is certainly not contrary to the weight of the evidence. *See Artmark Chicago, Ltd.* v. *United States*, 64 CCPA 116, C.A.D. 1192, 558 F. 2d 600 (1977).

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[19] The dissenting opinion agrees that loading charges, like ocean freight carrying and unloading charges, are not part of the export value, but agrees with the Customs Court's conclusion that appellant "failed to carry its burden of proof on the issue of separability." It must be noted, however, that the Customs Court reached this conclusion only *after* it had erroneously held that loading charges were akin to inland freight charges and, thus, could be part of the export value. Under or holding, the "separability doctrine" is never reached, and charges which are not part of the export value are treated as in *United States* v. *Josef Mfg., Ltd., supra*. Moreover, the evidence of record, particularly the special customs invoices, establishes the C. & F. Detroit price, the loading charges, and the fact that the C. & F. price included the loading charges. We have been directed to no evidence to the contrary, nor has the Government sought to challenge the correctness of these values.

Decisions of the United States Customs Court

Customs Decisions

(C.D. 4745)

ATAKA AMERICA, INC. *v.* UNITED STATES

Memorandum Opinion Accompanying Order

Court Nos. 73-9-02625-S, etc.

Port of New York

[Judgment for defendant.]

(Dated June 5, 1978)

Rode & Qualey (*Ellsworth F. Qualey* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Jerry P. Wiskin*, trial attorney), for the defendant.

BOE, Judge: The defendant has filed a motion for summary judgment in the above-entitled action requesting that the classification of the imported merchandise under item 709.05, TSUS, by the Regional Commissioner of Customs at the port of New York, New York be sustained. In so doing, the defendant urges that the within proceedings are controlled by the decision of the United States Court of Customs and Patent Appeals in the case of *United States* v. *Ataka America, Inc.*, 64 CCPA —, C.A.D. 1184, 550 F. 2d 33 (1977). By prior order of this court, the record in the prior *Ataka* case has been incorporated and made a part of the record herein.

The plaintiff in objecting to the motion of the defendant contends that there are issues of fact relating to the use of the merchandise in question which have not been resolved by the pleadings and that the entry of summary judgment herein would deny the plaintiff a right to a trial before this court of such material facts that are in issue. After a consideration of the briefs submitted by counsel and after an oral argument, the court is of the opinion that the doctrine of stare decisis is applicable in the above-entitled action and that, accordingly, the defendant's motion for summary judgment must be granted.

It is acknowledged that the parties involved in the instant action as well as in the prior case of *United States* v. *Ataka America, Inc.*, *supra*, are identical. It is further admitted that the instrument (fiberscope) in question in the instant action is substantially the same type of merchandise in issue in the former decision of our appellate court. In like manner, the factual circumstances and the legal issue of the prior *Ataka* case are for all intents and purposes identical with those presented herein. The response of the plaintiff to defendant's motion does not indicate to the satisfaction of the court that any new evidence can or will be submitted in the event of a trial herein, which would present the consideration of facts different from those considered in the prior *Ataka* case. The affidavits of two of the witnesses submitted as a part of plaintiff's response to the motion for summary judgment by the defendant, although rephrased, are in all material respects the same as the testimony offered by such witnesses at the trial of the prior *Ataka* case. The testimony of the third witness offered by way of affidavit by the plaintiff is purely corroborative in charac ter. *See Herman D. Steel Co.* v. *United States*, 49 CCPA 30, C.A.D 790 (1962).

The basis of the plaintiff's contention that a trial before the court of all factual issues in this case should be permitted is predicated on the testimony that the optical features of the instrument in question

(fiberscope) are subsidiary to the diagnostic and therapeutic elements of the instrument (use in connection with biopsies and cytoiogies). The mere declaration of such an opinion contained in the affidavits submitted by plaintiff does not constitute such new evidence as would remove the instant action from the purview of the decision of the United States Court of Customs and Patent Appeals in the prior case of *United States* v. *Ataka America, Inc., Supra.* In discussing the alleged subsidiary character of the visual elements of the fiberscope, our appellate court therein stated:

> * * * Depending upon the situation, that visual operation may be all that is performed. It is only after visual examination that a decision to take a biopsy or cytology specimen can be made.
>
> To term optical features merely subsidiary to biopsy-cytology features, when the latter *require* the former, and when the latter are not always used and the former are always used, would be contrary to reason. Accordingly, we hold that the imported fiberscopes meet the definition of "optical instruments" in headnote 3. * * * Id. —, 550 F. 2d 37–38.

It is noted that in the petition for rehearing to the United States Court of Customs and Patent Appeals in the prior *Ataka* case, many arguments were raised, which are similarly urged herein, relating to the misapprehension and misinterpretation of our appellate court with respect to the term "optical instrument" as contained in the Tariff Schedules of the United States. Whether such a misapprehension existed must necessarily be determined by our appellate court. Under the record submitted in connection with the instant action, it is obligatory upon this court to find that no further evidence has been presented sufficient to exclude the same from the decision of our appellate court in the prior case of *Ataka America, Inc., supra. See United States* v. *Eurasia Import Co., Inc.*, 34 CCPA 121, C.A.D. 353 (1946).

After the submission of the above-entitled action for determination, but at the time of the oral argument requested by the court, the plaintiff moved the court for leave to amend its claim as presented in its pleadings by asserting an alternative claim classifying the merchandise in question under item 708.76, TSUS, as a microscope. To this motion the defendant strenuously objected. It is the opinion of the court that such motion to amend at this late stage of the within proceedings is, indeed, untimely and, accordingly, is denied.

Let an order be entered accordingly.

(C.D. 4746)

SORTEX COMPANY OF NORTH AMERICA, INC. *v.* UNITED STATES

Sortex machines

INDUSTRIAL MACHINERY—FOOD PREPARATION AND MANUFACTURE

Electronic optical sorting, grading and screening machines exported from England and classified in liquidation upon entry at Detroit, Michigan, under TSUS item 712.49 as other electrical measuring, checking, analyzing, or automatically-controlling instruments and apparatus, which are chiefly used as industrial processing machines in the preparation and manufacture of food for human consumption, *held*, to be more specifically provided for under TSUS item 666.25 as other industrial machinery for the preparation and manufacture of food, even though the machinery has as an essential feature an electrical device.

Court No. 74-11-03110

Port of Detroit

[Judgment for plaintiff.]

(Decided June 6, 1978)

Schwartz & Lidstrom (*Steven P. Sonnenberg* and *Donald J. Ungar* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sheila N. Ziff*, trial attorney), for the defendant.

RICHARDSON, Judge: Electronic optical color sorting machines exported from England in December, 1973, were classified in liquidation upon entry at Detroit, Michigan, under TSUS item 712.49 as modified by T.D. 68-9 as other electrical measuring, checking, analyzing or automatically-controlling instruments and apparatus at the duty rate of 10 *per centum ad valorem*. And the plaintiff-importer claims that the machines should be classified under TSUS item 666.25 as modified by T.D. 68-9 as other industrial machinery for preparing and manufacturing food at the rate of 5.5 *per centum ad valorem*. Two models are involved in the importations before the court, namely, models 964 and 964C.[1]

At the trial Daniel Garnett, principal engineer of A.M.F. Incorporated, electrical products development group, testified that, among other things, he was employed as an engineer by plaintiff for approximately 10 years between 1966 and October, 1976, and that his

[1] Additionally it was stipulated at the trial that the model 962 machine concerning which testimony would be offered is the same as the model 964 machine which superseded it in production.

duties included machinery development, application and installation engineering, and, to some extent, involved the marketing of machines of the type in issue. Mr. Garnett was with Sortex when these machines were first introduced to the United States market, was involved in the initial introduction of the machines in that market, and worked as an engineer on many of the design problems which arose when the basic machines were adapted to different products. According to the witness the machine, as originally introduced, was designed for the sorting of rice, but was later adapted to sort beans, peanuts and corn, and to a small extent minerals and plastics.

Mr. Garnett testified that the machine operates by feeding the product to be sorted so that it is metered and singulated in the feed-in system. The product passes single file through optical chambers where electronic photosensors compare the product to a pre-set background. If a particle combined with the desirable product causes variations of reflectivity, because it is of a different color, an air blast is triggered electronically and that particle is removed from the stream of acceptable product. Individual particles are sorted, graded and scrubbed in the sorting machines.

Based upon his experience and expertise as an installation engineer Mr. Garnett described essential considerations in determining where the machines can be used efficiently. The machine must be placed in a suitable environmental area, away from temperature extremes, in a dry atmosphere, with access to main power and compressed air, out of direct sunlight and with suitable facilities for transport of the product to be sorted to and from the machine. Rain or snow could cause severe problems with the electronics and the electrical functions of the machine. Direct sunlight would upset the balance of light in the machine and adversely affect the performance of the machine. The witness said his role in marketing the sorters consisted of assisting Sortex salesmen in defining the best place in the various process lines to fit the machine, defining installation costs and ancillary equipment requirements.

Other evidence in the record discloses usage of the imported machines in the sorting of specific food products, namely, white beans, peanuts, almonds, pecan pieces, sesame seed, dehydrated potato pieces, split soybeans, peppers, cereal components, etc., in 23 states. Two of these sorting operations involving the machines were viewed by the court and counsel at the conclusion of the trial at plant sites in Michigan, namely, a peanut sorting operation at Livonia, Michigan, and a navy bean sorting operation at Charlotte, Michigan. In both instances the court observed, among other things, that the food products were fed from the blancher into the Sortex machines and

emerged therefrom after the removal of undesirable peanut and bean particles which were rejected and collected separately. Following the sorting of the peanuts the splits were further processed into peanut butter and placed in glass containers in the same plant.

Plaintiff contends primarily that the imported machines are described in item 666.25, and argues "[t]he Sortex machines of the same class or kind as those at issue herein, are chiefly used midway in the processes which take place in preparing and manufacturing food." Defendant counters, "it is patent that the Sortex 962 and 964 sorting machines were not, as of January 1974, chiefly used for preparing and manufacturing food, but, rather, to prepare various foodstuffs for market."

In the court's opinion the imported machines do come within the ambit of item 666.25.

The word "prepared," in the tariff sense as related to food has been judicially construed to mean that the food has been so processed as to be changed in character or advanced in condition and made more valuable for its intended use. *Stone & Downer Co.* v. *United States*, 17 CCPA 34, at p. 36, T.D. 43323 (1929).

In some of the cases before the court food, such as beans, is put in packages for sales to the wholesale-retail trade immediately after sorting, and in some others the food is subjected to additional processes in the same or another building before being packaged or sold as food, such as corn, candy, salted nuts, peanut butter, etc. Plaintiff contends that these processes either change the character of the mentioned food items or advance them toward the condition in which they are used. Plaintiff cites as supporting authority for its position that the sorting and grading function of the Sortex machines is a part of the process of preparing and manufacturing food the case of *Antonio Roig Sucrs. S. En C.* v. *United States*, 56 CCPA 72, C.A.D. 957 (1969), where the function of a 10-ton electric tower crane was to pick up sugarcane from a stockpile and load it on a conveyor, and thus start the sugarcane on its way into a sugar mill factory was held to be the first step in the process of manufacturing sugar from cane. Preparing beans or peanuts for human consumption requires a number of operations and many pieces of equipment of various kinds and the Sortex machine is one of them.

Plaintiff also relies on the 1969 *Summaries of Trade and Tariff Information* which include on its list of "other" industrial machines for preparing and manufacturing food, machines "to . . . sort, grade, . . . [and] screen," which is precisely what the Sortex machine before the court does. Since the 1969 *Summaries of Trade and Tariff Information* were prepared *after* the Tariff Schedules of 1963 were

enacted they are "not necessarily controlling in determining the intent of the enactors of the statute." *Dodge & Olcott, Inc.* v. *United States*, 45 CCPA 113, at p. 116, C.A.D. 683 (1958). Though the 1969 *Summaries* are "not necessarily controlling," their broadening of the 1948 list of the more important "other" kinds of machines under item 666.25 that perform functions in the preparation and manufacture of food that are similar to those listed in the *Summaries of Tariff Information* in 1948, is in keeping with the responsibility of the United States Tariff Commission to update the commodity *Summaries of Tariff Information*, and shows a recognition of "other" industrial machines that are just as essential to the preparation and manufacture of food as the machines previously listed. While machines that *sort*, *grade* and *screen* may have been considered embraced in "other" food preparing machines in the *Summaries of Tariff Information* of 1948, expressly listing such machines in the *Summaries of Trade and Tariff Information* of 1969 leaves no doubt that the Tariff Commission classifies a machine that performs the functions of *sorting*, *grading* and *screening*, as does the Sortex machine, as an industrial machine for preparing and manufacturing food. The *Summaries of Trade and Tariff Information* do serve as a helpful guide to the courts as well as the legislature in reaching decisions.

Where there is a substantial similarity between the function of two items of merchandise—one recognized and listed in a category in the *Summaries of Tariff Information* (1948), before the enactment of a statute (1963), and one listed under the same category in subsequent *Summaries of Trade and Tariff Information* (1969), after the enactment of said statute, the court may appropriately consider the two items of merchandise as being classified under the same item in the tariff schedules. See: *Christensen Diamond Products Co.* v. *United States*, 54 Cust. Ct. 221, C.D. 2537 (1965), where natural diamond dust was known before 1930 and was provided for in the Tariff Act of 1930, and synthetic diamond dust was developed after 1930, but both items of merchandise were substantially similar and performed substantially similar functions, and the court held that synthetic diamond dust should be classified the same as natural diamond dust.[2] See also

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[2] Congress amended the Tariff Act to conform the statute with the *Myers* decision. See: Senate Finance Committee Report, No. 530, on H.R. 7969, 89th Congress, 1st Session, at p. 13, on the Tariff Schedules Technical Amendments Act of 1965. The Report states:

". . . the Customs Court ruled in two separate cases that synthetic diamond dust was included within the duty-free designation under the old tariff law. (*Christiansen* [*sic*] *Diamond Products Co.* v. *U.S.* C.D. 2537; *Englehard Hanovia, Inc.* v. *U.S.* C.D. 2538.) In each instance, the Court found that the term "diamond dust" was not qualified by anything which preceded it in the statutory language; that the statute involved was an unqualified *eo nomine* provision; and that synthetic diamond dust, like its natural counterpart, was duty-free for tariff purposes.

Continued on next page.

F. W. Meyers & Co., Inc. v. *United States*, 76 Cust. Ct. 51, C.D. 4635 (1976).

The defendant contends that the decision in *Sortex Co. of North America* v. *United States*, 56 CCPA 41, C.A.D. 951, 410 F. 2d 443 (1969) is controlling in this case. The issue in the previous *Sortex* case was whether the machine was an agricultural instrument used in connection with farming operations or was a machine having as an essential feature an electrical device. The evidence clearly established that the machine was not employed by farmers on the farms but by business enterprises away from the farms which process crops produced by the farmers, and that the machine had as an essential feature an electrical element or device. The decision did not go so far as to say that when the Sortex machine is used as the end part of a preparation and manufacturing process (as in the case of beans) or as the middle part of such a process (as in the case of peanuts—some cleaned, shelled, separated and salted before sorting; some roasted, blanched and salted before sorting; and some sorted with the splits being made into peanut butter), the machine should not be classified under a more appropriate item in the Tariff Schedules. The issue in this case was not before the court in the earlier *Sortex* case.

After touring a Velvet Food Products, Inc. peanut butter plant in Livonia, Michigan, and a white bean processing plant in Charlotte, Michigan, with counsel for the parties in this case; seeing how the Sortex machine functions as a machine in the processing of said food items, and reviewing the record, especially pages 84 through 134 covering the use of Sortex machines in processing sesame seed, almonds, pecans, peanuts, white beans, soybeans, dehydrated potato pieces, peppers, cereal components, etc. in thirty one locations in the United States, the court is of the opinion that the chief use of the Sortex machine is as an industrial machine for preparing and manufacturing food by sorting, grading and screening food items for human consumption, and the court so holds.

The Sortex machine like so much other food processing machinery has as an essential element an electrical device, but it is more specifically provided for under TSUS item 666.25 as other industrial machinery for the preparation, processing and manufacture of food than under item 712.49 as other electrical measuring, checking, analyzing or automatically-controlling instruments and apparatus

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"Notwithstanding the fact that these Customs Court decisions are not yet final, your committee desires to make it clear that in the future synthetic miners' diamonds and synthetic diamond dust and powder are to be free of duty in the same manner as their natural counterparts.

"Accordingly, a new section is added to the bill to provide duty-free treatment for synthetic diamond dust and miners' diamonds. . . ."

for ships' logs, and for measuring and detecting alpha, beta, gamma, X-ray, cosmic or similar radiations, seismographs, etc., and the court so holds. See: Interpretative Rule: "10(c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it . . . ." Judgement will be entered for the plaintiff.

(C.D. 4747)

JOHN H. FAUNCE, INC.
MASONITE CORPORATION } *v.* UNITED STATES

Speed-up system for hardboard press

PART OF HARDBOARD PRESS—CLASSIFICATION

In the Tariff Schedules of the United States, hardboard is provided for *eo nomine*, and is included with certain wood products in part 3, schedule 2, rather than with paper and paperboard in part 4, schedule 2. Additionally, pursuant to headnote 1, part 1, schedule 2, hardboard is deemed to be wood for purposes of subparts D, E and F of part 1. Since in the TSUS, Congress recognized hardboard to be wood rather than paper or paperboard, the imported speed-up system for a hardboard press is not classifiable under the provision in item 668.06, TSUS, covering parts of machines for making cellulosic pulp, paper or paperboard, as claimed by plaintiffs, or under the provision in item 668.00, TSUS, covering machines for making cellulosic pulp, paper or paperboard, as alternatively claimed.

STATUTORY CONSTRUCTION—UNDER PRIOR TARIFF ACT

Judicial construction under a prior tariff act is not dispositive in a case arising under the TSUS, where as here, there has been a substantial change in the statutory provisions affecting the product. *Cf. Inter-Maritime Forwarding Co., Inc.* v. *United States*, 70 Cust. Ct. 133, C.D. 4419 (1973). Accordingly, *United States* v. *Superwood Corporation*, 52 CCPA 57, C.A.D. 858 (1965), and *F. S. Whelan & Sons* v. *United States*, 40 Cust. Ct. 192, C.D. 1982 (1958), decided under the Tariff Act of 1930, which contained no specific provision for hardboard, held not controlling under the TSUS.

MACHINES FOR MAKING PAPER AND PAPERBOARD AND PARTS THEREOF

Items 668.00 and 668.06, TSUS, cover machines and parts thereof that make "paper or paperboard" within the ambit of schedule 2, part 4, TSUS. Consequently, as hardboard is not paper or paperboard within the ambit of part 4, neither item 668.00 nor item 668.06 embraces machines or parts thereof for making hardboard.

MOTION TO CONFORM PLEADINGS TO EVIDENCE (RULE 4.8(b))

Since there is no evidence in the record specifically addressed to the factual issue of whether the transformation of materials in a Motala hardboard press results principally from temperature change, defendant's motion pursuant to rule 4.8(b) to conform the pleadings to the evidence, in order to assert a classification under item 661.70, TSUS, is denied.

Court No. 69/35104

Port of Philadelphia

[Judgment for defendant.]

(Decided June 7, 1978)

Sharretts, Paley, Carter & Blauvelt (*Patrick D. Gill* and *Donald W. Paley* of counsel) for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*John J. Mahon*, trial attorney), for the defendant.

NEWMAN, Judge: This action concerns the proper tariff classification for a "Motala" hardboard press speed-up hydraulic system exported from Sweden and entered at the port of Philadelphia in December 1968.

The speed-up system was assessed with duty by the district director at the rate of 9 per centum ad valorem pursuant to item 678.50, TSUS, as modified by T.D. 68–9, which provides for "Machines not specially provided for, and parts thereof". Defendant now claims, for the first time in its post-trial brief, that the merchandise is classifiable under item 661.70, TSUS, as modified, as part of an industrial machine for the treatment of materials by a process involving a change of temperature, which is dutiable at the rate of 11 per centum ad valorem. To assert this newly proposed classification, defendant moves to amend the pleadings to conform to the evidence under rule 4.8(b).

Plaintiffs claim that the merchandise is properly dutiable at the rate of 6 per centum ad valorem, either under the provision in item 668.06, TSUS, as modified, covering "Parts of machines for making cellulosic pulp, paper or paperboard", or alternatively under the provision in item 668.00, TSUS, as modified, covering "Machines for making cellulosic pulp, paper, or paperboard". In their reply brief, plaintiffs strenuously object to defendant's motion under rule 4.8(b).

I.

At the trial, each party presented the testimony of two witnesses and various exhibits. The official papers were received in evidence, without marking. Plaintiffs' witnesses were: George Uding, vice pres-

ident of manufacturing for the Hardboard Division of Masonite Corporation; and Jack Mulholland, vice president of manufacturing technology and engineering for Masonite Corporation. Defendant's witnesses were: Harry Radden, president of Miller Hoft, Inc.; and Charles A. Shoudy, vice president of project engineering for Olin Craft.

Portions of the record in *F. S. Whelan & Sons* v. *United States*, 40 Cust. Ct. 192, C.D. 1982 (1958), were incorporated in the record of the present case upon defendant's motion before trial, pursuant to an order of the court dated November 25, 1975.

In the circumstances of the present case, it is unnecessary to dwell at length on the testimony of record. The pertinent facts are not in dispute, and may be briefly summarized.

It has been clearly established that the imported speed-up hydraulic system was installed as an integral part of Masonite's Motala hardboard press located at its plant in Towanda, Pennsylvania. The system is designed to speed up the production cycle of the Motala hardboard press, thus increasing its efficiency in the production of hardboard. Further, it has been shown that the Motala hardboard press, by a combination of heat and pressure, consolidates a loose interfelting of fibers "so that you have a hard dense product which is known as hardboard" (R. 43). Finally, it appears that the Motala press is of the same class or kind as the hardboard press involved in *United States* v. *Superwood Corporation*, 52 CCPA 57, C.A.D. 858 (1965).

II.

In order for plaintiffs to prevail on either of their alternative claims, they were required to establish that the speed-up hydraulic system was used for making cellulosic pulp, paper or paperboard. There is no dispute that Masonite's Motala press (of which the speed-up system is a part) was used for making hardboard. Consequently, the tariff classification of hardboard itself is pivotal in determining whether the speed-up system is classifiable under either of the claimed provisions.

As dispositive of the issue presented, plaintiffs rely upon the *Whelan* and *Superwood* cases, *supra*, decided under the Tariff Act of 1930. In the 1930 act, there was no specific provision for hardboard. Thus, in *Whelan*, hardboard was held properly dutiable as pulpboard under paragraph 1413 of the Tariff Act of 1930.[1]

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[1] See also *F. S. Whelan & Sons* v. *United States*, 34 Cust. Ct. 208, C.D. 1706, 136 F. Supp. 328 (1955), wherein the same conclusion was reached.

Again, in *Superwood*, hardboard was held to be a form of paper, and certain hardboard making equipment (including a hydraulic press) was determined to be properly dutiable under paragraph 372 of the Tariff Act of 1930 as machines for making paper. Accordingly, if this case were governed by the Tariff Act of 1930, *Whelan* and *Superwood* would, plainly, be dispositive.

However, defendant contends that *Whelan* and *Superwood* are not viable under the TSUS in view of the new *eo nomine* provisions for hardboard, which defendant emphasizes were included in part 3 of schedule 2 of the Tariff Schedules rather than in part 4 of schedule 2. It should be noted that part 3 covers "WOOD VENEERS, PLYWOOD AND OTHER WOOD-VENEER ASSEMBLIES, AND BUILDING BOARDS", whereas part 4 includes "PAPER, PAPERBOARD, AND PRODUCTS THEREOF". Additionally, defendant cites headnote 1, part 1, schedule 2, in support of its contention that in the TSUS Congress recognized hardboard as wood. Headnote 1 reads:

> 1. For the purposes of subparts D, E, and F of this part, hardboard shall be deemed to be wood.

I agree with defendant that *Whelan* and *Superwood* are not controlling under the TSUS. Fundamentally, a judicial construction under a prior tariff act is not dispositive in a case arising under the TSUS, where as here, there has been a substantial change in the statutory provisions affecting the product. *Cf. Inter-Maritime Forwarding Co., Inc.* v. *United States*, 70 Cust. Ct. 133, C.D. 4419 (1973).

As observed, *supra*, there was no specific provision for hardboard in the Tariff Act of 1930, whereas in the TSUS, hardboard is covered *eo nomine* and included in part 3 of schedule 2, rather than in part 4 of schedule 2. The inclusion of hardboard in part 3 rather than in part 4 of schedule 2, as well as the insertion of headnote 1, part 1, schedule 2, clearly evinces a congressional recognition that hardboard is wood, and not paper or paperboard.

Even prior to the TSUS, Congress recognized hardboard as wood in various bills seeking to reclassify hardboard under the wood schedule of the Tariff Act of 1930. Hence, in *Weyerhaeuser Company* v. *United States* (*Abitibi Corporation, Party-in-Interest*), 71 Cust. Ct. 81, 92, n. 9, C.D. 4479 (1973), Judge Maletz stated:

> Although the House passed an amended version of H.R. 9666 in the second session of the 83d Congress and the Senate in the next session of Congress in 1955 (84th Cong. 1st Sess.) passed a similar provision as an amendment to a tariff bill, the Conference Committee deleted the hardboard reclassification portion of the bill in response to a letter from the President. This letter stated that "[b]y the Customs Simplification Act of 1954, the Congress

> instructed the U.S. Tariff Commission to review the entire schedule of tariff classifications and to recommend changes needed to remove anomalies and injustices. Action now by the Congress on any specific commodity would directly contravene this process which assures all industries of an orderly method for full consideration of their classification problems." See *Tariff Classification Study, Explanatory and Background Materials*, Schedule 2, at 205, 276 (1960).

In S. Rep. No. 387, 84th Cong., 1st Sess. 2 (1955), the Senate Finance Committee reported:

> * * * When the 1930 act was adopted, hardboard was a relatively unknown product. When first developed, it had some of the qualities of paperboard and was administratively classified as a paper product; however, later developments resulted in the production of hardboard which not only had the principal properties of wood but also a counterpart of wood in general usage.

Moreover in 1954, pursuant to a resolution and directive of the Senate Finance Committee, the Tariff Commission (since renamed International Trade Commission) conducted an investigation with respect to the hardboard industry in the United States and hardboard's tariff classification. See United States Tariff Commission, *Hardboard, Report on Investigation Conducted Pursuant to a Resolution by the Committee on Finance of the United States Senate, dated August 9, 1954* (1955). Based upon its thorough investigation, the majority of the Commission found, *inter alia* (at page 7), "that a specific enumeration of hardboard would be more appropriate *in the tariff schedule covering wood products* than in either the tariff schedule covering paper products or any other tariff schedule" (emphasis added). See also *Tariff Classification Study*, schedule 2 (Nov. 1960), pages 276–79. As noted above, in the TSUS hardboard was specifically enumerated in part 3 rather than in part 4 of schedule 2.

In light of the clear legislative recognition of hardboard as a wood product, I am persuaded that in the TSUS, Congress did not intend that hardboard should be regarded as paper or paperboard for purposes of classifying machines and parts under items 668.00 and 668.06, TSUS. In my opinion, the machines for making paper and paperboard, and parts thereof, intended to be classified under items 668.00 and 668.06, TSUS, are those machines and parts that make the paper or paperboard products within the ambit of *part 4*, schedule 2. Since hardboard explicitly is not paper or paperboard within the purview of part 4, schedule 2, neither item 668.00 nor 668.06 embraces the importation.

In sum, plaintiffs' contention (brief, p. 29) that the provisions for hardboard in the TSUS "did not represent the conclusion that hard-

board is not paper or paperboard" is totally without merit. If Congress considered hardboard as paper or paperboard, as urged by plaintiffs, hardboard most certainly would have been included with the paper and paperboard products in part 4 of schedule 2, rather than with the wood products in part 3 of schedule 2. Plainly, it would be anomalous and completely illogical to have excluded hardboard from part 4 of schedule 2 if Congress intended that hardboard should be considered as "paper or paperboard" for purposes of classifying machines or parts thereof under items 668.00 and 668.06, TSUS. For the foregoing reasons, I conclude that the imported speed-up system is not classifiable under the provisions claimed by plaintiffs.[2]

III.

As stated *supra*, defendant has moved to amend the pleadings to conform to the evidence, pursuant to rule 4.8(b), in order to assert, as it did for the first time in its brief, a proposed classification under item 661.70, TSUS.[3] Rule 4.8(b) reads:

> (b) Amendments To Conform to the Evidence: When issues not raised by the pleadings are tried by express consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. If evidence is objected to at trial on the ground that it is not within the scope of the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice him in maintaining his action or defense upon the merits. The court shall afford the objecting party an opportunity to meet such evidence.

Item 661.70, TSUS, as modified, provides for "Industrial machinery, plant, and similar laboratory equipment, whether or not electrically heated, for the treatment of materials by a process involving a change of temperature, such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporiz-

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[2] Although not cited by either party, the *Summaries of Trade and Tariff Information*, schedule 6, volume 8 (1967), page 217, state that item 668.00, TSUS, includes "machines for producing cellulosic building boards, such as insulating board and hardboard". Although considered as authoritative for certain puposes, the *Summaries* issued after the enactment of the TSUS, are not part of its legislative history, and therefore cannot be considered controlling as to legislative intent. *Amico, Inc. (Formerly Known As: Exhibit Sales, Inc.)* v. *United States*, 71 Cust. Ct. 182, C.D. 4494 (1973); *Volkswagen of America, Inc.* v. *United States*, 68 Cust. Ct. 122, C.D. 4348 340 F. Supp. 983 (1972), *aff'd per curiam*, 61 CCPA 41, C.A.D. 1115, 494 F. 2d 703 (1974); *W. R. Filbin & Co., Inc.* v. *United States*, 63 Cust. Ct. 200, C.D. 3897, 306 F. Supp. 440 (1969); *Border Brokage Company, Inc*, v. *United States*, 64 Cust. Ct. 331, C.D. 3999 (1970).

[3] Defendant requested that the second argument in its brief be considered such a motion.

ing, condensing, or cooling; * * * all the foregoing * * * and parts thereof: * * * Other", with duty at the modified rate of 11 percent ad valorem. Defendant contends that since the speed-up system is used in a hardboard press which utilizes heat and pressure, the importation is classifiable under item 661.70, TSUS; and that even if the importation is classifiable under both item 661.70 and either item 668.00 or 668.06, item 661.70 must prevail by virtue of headnote 1, subpart A, part 4, schedule 6. That headnote provides:

> 1. A machine or appliance which is described in this subpart and also is described elsewhere in this part is classifiable in this subpart.

Significantly, the *Tariff Classification Study*, schedule 6, discusses item 661.70, TSUS, as follows (at page 263):

> * * * Item 661.70 covers industrial and laboratory equipment, whether or not electrically heated, for the treatment of materials by a process involving a change in temperature. This equipment is designed to submit materials to a heating or cooling process in order to cause the simple change of temperature, *or to cause the transformation of materials resulting principally from the temperature change. The item does not cover equipment in which the heating or cooling, even if essential, is merely a secondary function designed to facilitate the main function.* * * * [Emphasis added].

As indicated in the *Tariff Classification Study*, equipment is not embraced by item 661.70 unless the transformation of materials result *principally* from the temperature change. See *Janegberg U.S.A., Inc.* v. *United States*, 66 Cust Ct. 247, C.D. 4198 (1971). The record is clear that in the production of hardboard with a Motala press a *combination* of heat and pressure is utilized. (R. 59, 106, 119–20, 133–34). Thus, item 661.70 raises an issue of fact as to whether heat in the Motala press is merely secondary, designed to facilitate the pressure applied by the press; or whether pressure is secondary, designed merely to facilitate the application of heat; or whether heat and pressure are coequal functions of the Motala press.

I do not find, nor does defendant cite, any evidence of record specifically addressed to the factual issue of whether the transformation of materials in the Motala press results *principally* from temperature change. Nevertheless, defendant baldly argues in its brief that "the application of heat cannot be said to be a secondary function". (Defendant's brief, page 35). Since no evidence was adduced concerning the factual issues raised by item 661.70, in no event could a determination be made that the merchandise is properly classifiable under such provision. Fundamentally, the district director's classification under item 678.50, TSUS, is presumed to be correct, and "the presumption that the goods have been properly classified has evidentiary

weight, in and of itself". *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, 58, C.A.D. 1004, 435 F.2d 1315 (1970). Consequently, it is presumed the district director correctly found that the merchandise is not classifiable under item 661.70, TSUS.

In a word, defendant's reliance on rule 4.8(b) is misplaced, and its motion to amend the pleadings to conform to the evidence is denied.

However, inasmuch as plaintiffs failed to establish the propriety of either of the claimed classifications, this action is dismissed. Judgment will be entered accordingly.

(C.D. 4748)

JANEX CORP. *v.* UNITED STATES

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 77-5-00721

Port of New York

[Judgment for plaintiff.]

(Decided June 7, 1978)

Sharretts, Paley, Carter Blauvelt, P.C. (*Peter Jay Baskin* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Laura D. Millman*, trial attorney), for the defendant.

NEWMAN, Judge: This action presents a classic instance for the appropriate utilization of a summary judgment—the procedural remedy which obviates protracted, expensive and unnecessary litigation where there is no justiciable question of fact.

The within case is before the court on cross-motions for summary judgment pursuant to rule 8.2. Presented for determination is the proper tariff classification for certain articles described on the invoices as "Raggedy Ann Nite Timers" and "Raggedy Andy Nite Timers", imported from Hong Kong through the port of New York in 1976.

The three entries involved herein were liquidated by the regional commissioner of customs as follows: In entry Nos. K520162 and K523068, the merchandise was assessed duty at the rate of 17.5 per centum ad valorem under the provision for "Dolls" in item 737.20, TSUS, as modified by T.D. 68–9; in entry No. K436738, the identical merchandise was assessed at the rate of 8.5 per centum ad valorem under the provision in item 772.15, TSUS, as modified by T.D.

68–9, for "household articles not specially provided for * * * of rubber or plastics: * * * Other".

Plaintiff challenges the Government's classifications, contending that the merchandise is properly dutiable at the rate of 5.5 per centum ad valorem under the provision in item 688.40, TSUS, as modified by T.D. 68–9, for "Electrical articles * * * not specially provided for".

I.

To the extent relevant to these cross-motions, the record comprises the pleadings (including plaintiff's sales brochure depicting the imported articles, which is attached to the complaint and marked exhibit A), and the following:

Plaintiff submitted: an affidavit by its president, A. W. Hughes, Jr., and a sample of the Raggedy Andy Nite-timer containing two "D" size dry cell batteries.[1]

Defendant submitted: a sample of the Raggedy Andy Nite-timer (marked exhibit A), which is identical to plaintiff's sample, except that a plastic ring at the end of a pull-cord at the rear of the figure is missing; two "D" size dry cell batteries in a brown bag (marked exhibit B); and a copy of a letter (marked exhibit C) from plaintiff's counsel, stating that certain samples of the merchandise in issue submitted to defendant are identical to those covered by the entries in this action.

There is no dispute that the Raggedy Andy samples before the court are representative of the Raggedy Ann articles, for which no sample was furnished by either party.

Mr. Hughes' affidavit avers:

As president of Janex Corp., he was personally involved in the design and development of the "Nite-timers". These Nite-timers were designed, developed and sold by plaintiff as night-lights for small children, and "include features, which make them capable of being placed on a night table, dresser, or similar piece of children's furniture so that when lifted they would provide a source of illumination in the dark, or could provide such illumination by pulling the cord on the back". Page 6 of plaintiff's 1976 catalog (exhibit A attached to the complaint) accurately depicts the Raggedy Ann and Raggedy Andy Nite-timers. Plaintiff's sample of the Raggedy Andy Nite-timers is identical to the imported Raggedy Andy Nite-timers, and is representative of the imported Raggedy Ann Nite-timers. The Raggedy Andy and Raggedy Ann Nite-timers differ "only to the

[1] These batteries were found on examination to be severely corroded, leaking and without power. Therefore, the samples of the merchandise in issue were operated by the court using the batteries submitted by defendant.

extent that the doll housing is Raggedy Ann rather than Raggedy Andy". The imported articles were not sold, marketed or advertised as dolls, but as "Nite-timers".

Defendant interposed no supporting or opposing affidavit.

II.

Fundamentally, of course, samples are potent witnesses and have great probative effect respecting the purpose for which an article is designed. *Amico, Inc.* v. *United States*, 79 Cust. Ct. 125, 130, C.D. 4723, 447 F. Supp. 444 (1977), *appeal pending; The Ashflash Corporation* v. *United States*, 76 Cust. Ct. 112, 120, C.D. 4643, 412 F. Supp. 585 (1976); *Amico, Inc.* (*Formerly Known As: Exhibit Sales, Inc.*) v. *United States*, 71 Cust. Ct. 182, 186, C.D. 4494 (1973). And this probative effect is particularly true here.

An examination of the samples submitted by the parties discloses that the imported articles consist of plastic figures, approximately 8¼ inches in height, representing the form and features of the well-known storybook characters, Raggedy Andy and Raggedy Ann. The figures have a hollow interior which accommodates two "D" size dry cell batteries,[2] electrical switches, wiring, a bulb and other electrical components for illumination through the top of the figures. The articles are designed to light automatically when lifted off a surface (i.e., a dresser top), and switch off when set down again. This operation is accomplished by a pressure switch, which protrudes through the figure's feet when the article is lifted off a surface, and is depressed when the figure is set down again. Additionally, each figure has a pull-cord switch with a ring attached by which the light may be turned on for a brief period and then automatically turned off. Activation of the pressure or pull-cord switches, in addition to making the light turn on and off, also causes the figure's eyes to raise and lower simultaneously with turning the light on and off.

Defendant's exhibit A was operated in a darkened room and an artificial light, and was found to emit illumination typical of a night-light. *Cf. The Ashflash Corporation* v. *United States, supra; Amico, Inc.* (*Formerly Known As: Exhibit Sales, Inc.*) v. *United States, supra.* Although defendant asserts (brief, p. 7) that its sample (exhibit A) illuminates for only three seconds, my examination revealed that when the sample was lifted from a surface and held in the hand, it remained illuminated indefinitely, and when the pull-cord switch was utilized, it remained illuminated for approximately fifteen seconds.

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[2] Batteries were not included in the importations.

Each Nite-timer is packaged for retail sale in a cardboard box, upon which is prominently printed:

RAGGEDY ANDY t.m.
NITE-TIMER t.m.

THE AUTO-MAGIC
BOY & GIRL
NITE-TIME LIGHT

PICK ME UP . . .
LIGHT GOES ON . . .
EYES OPEN WIDE!

PUT ME DOWN . . . .
LIGHT GOES OFF
. . . . . EYES CLOSE!

SET TIMER . . . . . .
RAGGEDY ANDY KEEPS
HIS LIGHT ON UNTIL
YOU'RE SAFELY IN
BED . . . . AND HE
GOES TO SLEEP WITH
YOU!

PORTABLE!
TAKE IT,
CARRY IT,
ANYWHERE!

FOR AGES
4 & OVER

BATTERY OPERATED
Requires 2 "D"
Cell batteries
(not included)

Significantly, nowhere on the package is the merchandise referred to as a "doll".

III.

Turning now to the legal aspects, plaintiff contends that the night-light feature makes the imported articles "more than" dolls and properly classifiable under item 688.40, TSUS, as electrical articles, not specially provided for. Further, plaintiff argues that the articles covered by entry No. K436738 are more specifically provided for under item 688.40, TSUS, than under item 772.15, TSUS.

Defendant's position is that the articles *in all three entries* are classifiable as dolls under item 737.20, TSUS; and that respecting entry No. K436738, plaintiff's claim under item 688.40 should be overruled *without affirming the classification under item 772.15*, TSUS.[3]

[3] In its answer, defendant interposed two alternative classifications: Item 737.20, TSUS (entry No. K436738 only), and item 653.39, TSUS, providing for illuminating articles of base metal. However, in its cross-motion, defendant does not urge the latter classification.

Additionally, defendant contends that if, as argued by plaintiff, the articles are "more than" dolls, then they are likewise more than electrical articles.

After careful consideration of the pleadings, the uncontradicted affidavit submitted by plaintiff (defendant submitted no supporting or opposing affidavit), the exhibits and the memoranda of law filed by the parties, I have no difficulty in concluding that there is no genuine issue as to any material fact, and that summary judgment should be rendered sustaining plaintiff's claim under item 688.40, TSUS.

IV.

We first address the issue of whether the imported articles are dolls as classified by the Government (in two of the three entries), or "more than" dolls as claimed by plaintiff.

Plaintiff argues that "[e]ven if it is concluded that the nitetimers can function as dolls, one simply cannot ignore the fact that they are also night lights" (brief, p. 4). The thrust of defendant's position is that item 737.20, TSUS, is an *eo nomine* provision which covers all forms of dolls, and that "[t]he merchandise is a doll with an illuminating capacity hidden within it which may or may not be used but, when used, merely increases the play value of the doll" (brief, p. 21).

The law governing this case is succinctly enunciated in a recent decision, *Amico, Inc.* v. *United States, supra*, wherein one of the issues determined was whether the merchandise constituted a "music box" within the meaning of item 725.50, TSUS, or "more than" a music box by reason of the presence of a dancing couple. Respecting the "more than" doctrine, Judge Maletz commented (79 Cust. Ct. at 130–31):

> "It is well settled that merchandise which in fact constitutes more than a particular article or which has *additional nonsubordinate* or *co-equal* functions is not classifiable as that article." [Emphasis added.] Sturm, *A Manual of Customs Law* (1974), p. 298, and cases cited. Put otherwise, "[t]here has recently been a spate of cases in the Customs Court involving the 'more than' doctrine. It has been applied in cases where the article was found to have two coequal functions or *where a second function was not incidental, subsidiary or auxiliary.*" Sturm, *A Manual of Customs Law* (Supp. 1976), p. 72.
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> *The question, therefore, is whether the dancing couple provides an incidental or subsidiary function,* as argued by plaintiff, or whether the dancing couple provides a nonsubordinate function, i.e., a function which is not incidental or subsidiary, as argued by defendant. For the reasons that follow, the court concludes that the function of the dancing couple is not incidental or subsidiary and that the imported articles are therefore "more than" music boxes. [Emphasis added in part].

In light of the foregoing, the nub of the issue here is whether the night-light function of the imported articles may be considered as an incidental, subsidiary, or auxiliary function of a "doll", as that term has been construed and applied by the court.

The question of what constitutes a "doll" has been before the court on many occasions. In *Russ Berrie & Co., Inc.* v. *United States*, 76 Cust. Ct. 218, C.D. 4659, 417 F. Supp. 1035 (1976), *appeal dismissed*, 63 CCPA 125 (1976), Judge Maletz reviewed a long line of decisions construing the tariff provision for dolls, and several lexicographical authorities, and made the following observations (76 Cust. Ct. at 223–25):

> It is well established in customs jurisprudence that the tariff provision for dolls is not a use provision but an *eo nomine* provision. *United States* v. *Cody Manufacturing Co., Inc., et al.*, 44 CCPA 67, 74–4, C.A.D. 639 (1957); *Louis Wolf & Co., Inc.*, v. *United States*, 15 Cust. Ct. 156, 161, C.D. 963 (1945); *The American Import Company* v. *United States*, 22 Cust. Ct. 51, 53, C.D. 1158 (1949); *Barum Co., Inc.* v. *United States*, 30 Cust. Ct. 414, 417, Abs. 57251 (1953).
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> Equally well established is the concept that a doll for tariff purposes is not confined to playthings for children but includes a wide range of other articles including but not limited to dolls for ornamentation such as boudoir dolls, souvenir or prize dolls dolls for display or advertising purposes, and dolls sold as gag items, bar gadgets, adult novelties, etc. *Louis Wolf & Co., Inc.* v. *United States, supra*, 15 Cust. Ct. at 157, 158; *Gold-Silver & Co.* v. *United States*, 35 Cust. Ct. 246, 247, Abs. 59301 (1955). * * *
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> As we have seen, the common meaning of the word "doll" encompasses a great variety of merchandise. Perhaps because the variety is so vast, the courts have not been able to render a comprehensive definition of the term "doll," nor have they been able to ". . . make any all-embracing finding as to what is a doll or to hold that all small figures are dolls . . . ." [Footnote omitted. [Nonetheless, there does appear to be a certain amount of agreement among the lexicographical authorities. To illustrate, we start with the following lexicographic authorities to which reference was made in *Louis Wolf % Co., Inc.* v. *United States*, *supra*, 15 Cust, Ct. at 160:
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> > . . . [W]e are of opinion that the common meaning of that term [doll] is sufficiently comprehensive to include all dolls, whether or not they are toys. In support of this view, it will be noted that the secondary definition of "doll" as given in Webster's New International Dictionary, 2d Edition, 1936, reads:
> >
> > * * * any similar figure for play or *ornament*. [Italics supplied.]

> This broader view is further borne out by a comprehensive article on the subject of dolls appearing in the Encyclopaedia Britannica, 14th Edition, wherein the history, development and use of various types of dolls are set forth in detail, indicating besides their use as playthings for children, wide use in religious rites and other ceremonies in many parts of the world from earliest times to the present day.

More recent lexicographical authorities agree that the word "doll" encompasses a broad spectrum of articles which are commonly known as dolls. Thus in *Webster's New International Dictionary* (2d ed., 1953), p. 767, a doll is described as:

> doll * * * 2. A child's puppet; esp., a toy baby for a child; any similar figure for play or ornament.* * *

In Vol. 9 *Encyclopedia Americana* (Internat. ed., 1973) p. 255, a doll is described as:

> DOLL, a figurine of a human being. The word was first used for the child's toy about 1700, possibly as a contraction of Greek eidolon ("idol"), but more probably from the girl's name "Doll" which was short for "Dorothy." Some authorities now use the word only to refer to the child's toy. Other classes of dolls include religious figurines, objects of art and *souvenirs*. [Emphasis added.]

In Vol. 8 *Collier's Encyclopedia* (1973 ed.) p. 313, a doll is described as:

> DOLL, a plaything usually in the form of a baby or child, widely cherished by small girls; also, the ornamental figurines collected by adults as objects of art, curios, *keepsakes*, or *souvenirs*. [Emphasis added.]

Plainly, then, the figures representing Raggedy Ann or Andy, *standing alone*, respond to the common meaning of the term "doll". Nevertheless, the evident design, purpose and function of the articles as portable night-lights cannot be ignored. The major selling feature of the articles, clearly, is "THE AUTO-MAGIC NITE-TIME LIGHT". In my view, such feature is not incidental, subsidiary, or auxiliary to the use of the articles as "dolls", as that term is commonly used.

Significantly, too, the merchandise is not sold, marketed, or advertised as dolls (Hughes' affidavit, par. 10). Neither the descriptive representations contained in plaintiff's sales catalog (exhibit A attached to the complaint), nor those prominently printed on the retail packaging (portions of which have been quoted previously), refer to the merchandise, or any part thereof, as a doll.

Under these circumstances, defendant's contention that the articles are dolls with an incidental illuminating capacity to enhance their play value is totally without foundation. Although as pointed out in *Russ Berrie* the tariff provision for dolls has been broadly construed

to encompass a wide variety of articles, none of the definitions quoted or cases cited therein establish that the common meaning of the term "doll" is broad enough to encompass the instant night-lights housed as Raggedy Ann and Andy figures.

Cragstan Corporation v. *United States*, 51 CCPA 27, C.A.D. 832 (1963), is somewhat analogous to the present case. There, a "Baby in Walker", consisting of a miniature of a clothed baby doll about 10 inches in height supported in an upright position by a metal walker, was held to be "[o]bviously * * * something more than just a figure or image of an animate object". As the rationale for its holding, the Court of Customs and Patent Appeals stated (51 CCPA 29–30):

> * * * The walker is not incidental—just a brace to hold the baby doll upright—the walker gives the toy its unique and distinctive character and without it the toy would be merely another baby doll. The toy, as an entity, consists of two components, both equally essential, the baby doll and the walking mechanism, the latter having wheels and part thereof being permanently attached to the baby doll. The walking mechanism is an integral part of the toy. * * *
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> * * * * * * *
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> * * * The logical conclusion of appellant's argument is that a baby doll should be classified in the same category as a baby doll in a walker and since a baby doll in a walker is an entirely different toy than without the walker, we believe that it was not the intention of Congress that they both have the same classification.

Here, too, the merchandise consists of two components, both equally essential: the housing in the form of a doll, and the electrical or illuminating components which give the article its unique and distinctive character without which the article would be no more than another Raggedy Ann (or Andy) doll. Further, to paraphrase what our Appellate Court stated in *Cragstan*, since the present article with a function as a night-light is an entirely different article than a doll, which does not possess that function, I am clear that it was not the intention of Congress that they both have the same classification.

In sum, the articles in issue are not merely dolls, nor do the imported articles comprise dolls of which the illuminating feature is merely incidental. Rather, it is emphasized that the imported articles uniquely incorporate into one integral unit the separate functions of two articles (doll and night-light), thus constituting a new commercial article—a "Nite-timer"—with a distinctive and unique character of its own. Considering the "design, character, and purpose" of the imported articles as both a doll and as a night-light, their classification under item 737.20, TSUS, which covers solely the doll component, is plainly

precluded. *Cf. Clutsom Machines, Inc.* v. *United States*, 21 Cust. Ct. 30, 37. C.D. 1122 (1948).

Defendant urges that since the imported articles could be used in the daytime as dolls without utilizing their illuminating feature, the application of the "more than" doctrine is precluded.[4] This contention is also without merit. In *Sherriff-Guerringue, Inc.* v. *United States*, 62 Cust. Ct. 711, C.D. 3852 (1969), musical bubble-blowing saxophones, incorporating into one integral unit the separate functions of a toy saxophone and a child's bubble pipe, were held to be "more than" a toy musical instrument under item 737.60, TSUS, and properly classified as toys, not specially provided for under item 737.90, TSUS.

Respecting the use of the bubble-blowing mechanism, which plaintiff asserted was an incidental feature of the article, the court commented (62 Cust. Ct. at 713–15):

> * * * the presence of the bubble-blowing apparatus clearly makes the article *more than* a toy musical instrument. For the record establishes (as we have seen) that the bubble-blowing mechanism is an integral and non-segregable part of the article, and that this mechanism and the musical part each constitutes an essential component of the finished article. In other words, the article before us incorporates into one integral unit the separate function of two separate toys—a toy saxophone and a child's bubble pipe, and thus constitutes a new commercial article with an unique and distinctive character of its own. "An article will be excluded from its normal provision when, by virtue of joinder with another article, it becomes an inseparable part of a multi-function entity. That is to say, when the change undergone is no longer merely an evolutionary advance or the addition of a subsidiary auxiliary part, the changed article becomes more than that which it formerly was." *V. Alexander & Company, Inc.* v. *United States*, 59 Cust. Ct. 510, 514, C.D. 3212, 276 F. Supp. 573, 576 (1967). See also *Garrard Sales Corp.* v. *United States*, 35 CCPA 39, C.A.D. 369 (1947) (combination phonograph and radio held not to be a phonograph); *A. Tanzi Engineering Co., Schneider Bros. & Co., Inc.* v. *United States*, 30 Cust. Ct. 4, C.D. 1490 (1952) (machine that both cuts and rolls pastry dough is more than either a cutter or roller); *Kaufman & Vinson Co.* v. *United States*, 44 Cust. Ct. 238, C.D. 2180 (1960) (combination map-measurer and magnetic compass is more than a measuring instrument).
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> Plaintiff, however, adverts to the testimony of its witness that in over 50 percent of the purchases that he has seen at fairs and

[4] In paragraph 24 of its answer, defendant "avers that the imported articles consist of dolls *chiefly used in the household to illuminate a room at night*". [Emphasis added].

> dime stores, the children did not buy the bubble solution and were not observed using the bubble-blowing feature. From this plaintiff concludes—as did the witness—that the bubble-blowing function is an incidental feature of the article. The argument has little merit. *For the question in a situation like that here is not how the article was actually used but what it was constructed and designed to do.* See e.g., *Dubrow & Hearne Manufacturing Co.* v. *United States*, 9 Ct. Cust. Appls. 148, 152, T.D. 37993 (1919); *United-Carr Fastener Corporation* v. *United States*, 56 Cust. Ct. 347, 351–52, C.D. 2648 (1966). [Emphasis added].

Here, too, the imported article notwithstanding its characteristics as a doll, was constructed and designed to be used as a night-light, and it is immaterial to what extent it was actually used for that purpose.

The merchandise in the present case may be contrasted to that in *Astra Trading Corp.* v. *United States*, 56 Cust. Ct. 555, D.C. 2703 (1966), wherein Judge Ford, writing for the Second Division, held that a screwdriver with a flashlight component for illumination was not more than a screwdriver due to the presence of the illuminating feature. Respecting the "more than" issue, the court stated (56 Cust. Ct. at p. 561):

> The decision in *United States* v. *A. W. Fenton Company, Inc.*, 49 CCPA 45, C.A.D. 794, cited by plaintiff, is distinguishable. In that case, the imported article contained a motor which also embodied gears and a frame which served as a housing for other parts of the floor polisher. The additional features made the article more than a special type of a motor since it formed part of the assembly of the floor polisher. *The rationale of the A. W. Fenton decision, supra, would be applicable herein if the record showed that the article had a use in addition to its use as a screwdriver.* However, plaintiff's own witness, when questioned as to the purpose fo the importation, stated, without qualification, that the article was "designed specifically to be used as an illuminated screwdriver," and "the purpose of this entire item is to be used as a screwdriver * * *."
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> * * * We do not believe that the additional feature of illumination transforms the basic purpose of the imported article from use as a screwdriver into some other use; *nor do we believe that the illuminating feature gives the article a use in addition to its intended use as a screwdriver.* For, illumination notwithstanding, the article remains essentially a device restricted to the use of turning screws, i.e., a screwdriver. * * * [Emphasis added].

Significantly, the illuminating feature of the screwdriver in *Astra* merely assisted or facilitated the screw-turning function whereas in the present merchandise the illuminating feature performs a function as a night-light, which is independent of any function or use the articles may have as a doll. And unlike such features commonly

incorporated in dolls as mechanisms that create tears, cause the arms or legs to move, produce a voicelike sound, or otherwise contribute to a lifelike simulation,[5] the illuminating feature of the instant articles does not in the least contribute to a lifelike simulation. On the contrary, the illumination feature was solely intended to make the articles useful *in the dark* as a night-light, a function mutually exclusive of the articles' use as dolls.

Similarly, the imported articles are not at all analogous to the figurines in *United States* v. *Cody Manufacturing Co., Inc., et al.*, 44 CCPA 67, C.A.D. 639 (1957), which were dedicated to exclusive use as dancing dolls for a music box.

V.

Having determined that the imported articles are more than dolls, we now turn to plaintiff's claim that the merchandise is properly dutiable as "Electrical articles * * * not specially provided for" under item 688.40, TSUS. Fundamentally, of course, even though a plaintiff has established that the Government's classification is erroneous, the plaintiff has the burden of proving the correctness of its own claimed classification. *Amico, Inc.* v. *United States, supra.*

Central to the dispute respecting plaintiff's claim is whether the description "electrical articles" in item 688.40, TSUS, fully describes the imported articles. Defendant advances the argument that item 688.40 "does not describe the entire article, but only an interior element" (brief, p. 25). Such argument is untenable.

Obviously, the description "electrical articles" is broad enough to encompass not merely an interior electrical element, but also any exterior housing or casing enclosing such element. Here, the Raggedy Ann and Andy figures serve as the exterior housing for the night-lights, and consequently the imports are not more than "electrical articles", as urged by defendant.

VI.

Defendant also insists that the imported articles cannot be used as night-lights because, by definition, night-lights provide illumination of long duration, and are intended to be stationary. However, defendant has overlooked that the Tariff Commission (now Inter-

[5] In *Brechner Bros.* v. *United States*, 58 Cust. Ct. 272, 275, C.D. 2959 (1967), the court observed: "Certainly the court can take judicial notice of the fact that technological advances have visited the dollmaking business to the extent that walking, talking, and crying dolls of all sizes and shapes permeate the modern market places. The extent and degree of imaginative and *lifelike features* incorporated in these products are sometimes almost incredible." (Emphasis added).

national Trade Commission) recognizes there are portable "night-lights" with a self-contained electric source, which are "designed to light automatically when lifted off a surface and switch off when set down again". See *Summaries of Trade and Tariff Information*, Schedule 6, Vol. 10 (1969), p. 216.[6] The "Nite-timers", of course, meet that description.

VII.

Finally, as pointed out by Judge Rich, writing for the Court of Customs and Patent Appeals in *The Englishtown Corp.* v. *United States*, 64 CCPA —, C.A.D. 1187, 553 F.2d 1258 (1977), in applying the "more than" doctrine, only the most general rules can be ascertained from the previous decisions, and each case must in the final analysis be determined on its own facts. See also *United States* v. *Mobay Chemical Corporation*, 65 CCPA —, C.A.D. 1206, — F. 2d — (1978). Predicated upon the undisputed facts in this case, I find that the imported articles possess a "second significant function" justifying the application of the "more than" doctrine. *Cf. United States* v. *Oxford International Corp.*, 62 CCPA 102, 105, C.A.D. 1154, 517 F. 2d 1374 (1975). Therefore, the imported articles are more than dolls, as provided for in item 737.20, TSUS, and are classifiable as electrical articles, not specially provided for under item 688.40, TSUS. The provision in item 688.40, TSUS, is more specific than item 772.15, TSUS, the provision under which the merchandise was classified by the Government in entry No. K436738. *Prestigeline (Div. of Weiman Co., Inc.)* v. *United States*, 75 Cust. Ct. 139, C.D. 4618, 406 F. Supp. 532 (1975). Hence, plaintiff's motion for summary judgment is granted, and defendant's cross-motion is denied. Judgment will be entered accordingly.

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[6] According to the *Summaries*, *supra*, item 683.80, TSUS, covering portable electric lamps with self-contained electric source (other than flashlights) specifically encompasses *portable night-lights*. But, item 683.80, TSUS, is not asserted by either plaintiff or defendant. Plaintiff's position is that although the merchandise is more than a doll, it is similarly more than a portable night-light, and "[t]he one tariff provision which fully describes the subject articles, notwithstanding their dual function character, is Item 688.40, TSUS, as claimed by the plaintiff". (Brief, p. 9).

(C.D. 4749)

UNITED MERCHANTS & MANUFACTURERS, INC. *v.* UNITED STATES

Memorandum Opinion and Order on Cross-Motion to Dismiss

Court No. 76–3–00547

Port of Norfolk

[Action dismissed.]

(Dated June 8, 1978)

Vandeventer, Black, Meredith & Martin (*G. W. Birkhead* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Edmund F. Schmidt*, trial attorney), for the defendant.

LANDIS, Judge: Plaintiff has filed motion to amend the summons heretofore filed herein by adding two omitted protest numbers. Defendant has filed opposition and cross-motion to dismiss the entire civil action for lack of jurisdiction setting up *inter alia* that plaintiff has not filed a timely original summons with this court.

The facts are undisputed: In this case, notice of the denial of the protest was mailed on August 25, 1975. Plaintiffs summons was filed on February 27, 1976, the 186th day after the mailing of the denial. 28 U.S.C. § 2631(a) is unequivocal: "An action over which the court has jurisdiction . . . is barred unless commenced within one hundred and eighty days after: (1) the date of mailing of notice of denial . . . ".

This action is dismissed.

(C.D. 4750)

GENE MILLER, a/c J. J. CAMILLO SEAFOODS BROKERAGE CO. *v.* UNITED STATES

Court No. 74–11–03244

Port of Los Angeles

J. J. CAMILLO SEAFOOD BROKERAGE *v.* UNITED STATES

Court No. 75–3–00552

Port of Los Angeles

J. J. CAMILLO, INC. *v.* UNITED STATES

Court No. 76-11-02537

Port of San Diego

Boiled baby clams—American selling price—Export value

[Judgment for defendant.]

(Decided June 9, 1978)

Stein, Shostak, Shostak & O'Hara, Inc. (*John N. Politis* of counsel) for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*Bruce M. Mitchell*, trial attorney), for the defendant.

MALETZ, Judge: A joint trial of these actions was held. At this trial, after plaintiffs had completed the presentation of their evidence, defendant moved for dismissal of the actions pursuant to rule 8.3(c) on the ground that on the facts and the law plaintiffs had failed to prove a *prima facie* case. The court granted defendant's motion to dismiss. In conformity with rule 8.3(c) the court makes the following findings of fact and conclusions of law stating the reasons and facts upon which judgment on the merits against the plaintiffs—which is hereby entered—is based.

Findings of Fact

1. The merchandise at issue consists of boiled baby clams packed in 10 oz. or 27⅛ oz. tins.

2. The merchandise was exported from Japan on November 12, 1971; July 30, 1972; March 2, 1973; or April 23, 1976.

3. The merchandise does not appear on the Final List of the Secretary of the Treasury, T.D. 54521.

4. The merchandise was appraised on the basis of American selling price as defined in section 402(e) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.

5. Plaintiffs contest the use of American selling price as the basis of appraisement, claiming that no like or similar merchandise was produced in the United States at the time of exportation of the imported merchandise and that the imported merchandise should have been appraised on the basis of export value as defined in section 402(b) of the Act at the invoice unit values, packed, less ocean freight, hauling, and lighterage.

6. The court is pretermitting the issue of whether the plaintiffs have sustained their burden of overcoming the presumption of correctness and is making no finding with respect thereto.

7. At trial, plaintiffs fails to prove *prima facie* that at the time of exportation to the United States of the merchandise undergoing appraisement, the invoice unit values, packed, less ocean freight, hauling and lighterage, were the prices at which such or similar merchandise was freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, as contemplated in section 402(b).

Conclusions of Law

1. The court has jurisdiction of these actions pursuant to 28 U.S.C. 1582(a).

2. The protests covered by the civil actions were timely filed and the actions were timely commenced.

3. Under 28 U.S.C. 2635, the decision of the appraising officer is presumed to be correct and the burden to prove otherwise rests upon the parties challenging the decision. In these cases, plaintiffs had the burden of overcoming the presumption by establishing, through competent and sufficient evidence, that export value rather than the American selling price is the correct statutory basis of appraisement and that their claimed values represent the proper export value for the imported merchandise.

4. The court makes no determination as to whether plaintiffs have overcome the presumption of correctness of the American selling price basis of appraisement, and is pretermitting that issue.

5. Plaintiffs have failed to prove *prima facie* that the invoice unit prices less ocean freight, hauling and lighterage were the prices at which such or similar merchandise was freely sold, or, in the absence of sales, offered for sale in the principal markets in Japan, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, pursuant to section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.

6. For the foregoing reasons, the appraised values are hereby affirmed.

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *June 12, 1978.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

ROBERT E. CHASEN,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/66	Ford, J. June 8, 1978	T. D. Downing Co.	69/27782, etc.	Item 653.37 17%	Item 653.35 9%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Boston Brass candlestricks, lanterns, etc.
P78/67	Ford, J. June 8, 1978	Metasco, Inc.	75-11-02793	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/68	Ford, J. June 8, 1978	F. W. Myers & Co., Inc.	77-5-00762, etc.	Item 692.16 5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Champlain-Rouses Point (Ogdensburg) Skidder tractors, which are suitable for agricultural use.
P78/69	Watson, J. June 9, 1978	Perkin-Elmer Corporation	76-7-01746	Item 708.78 15%	Item 851.60 Free of duty	Agreed statement of facts	Chicago One electron microscope, model HU-12, entered for use of nonprofit institution established for educational purposes
P78/70	Newman, J. June 9, 1978	Durst Industries, Inc.	68/21192, etc.	Item 657.35 1.275¢ per lb. plus 15%	No separate appraisements for strainers and bases; liquidations premature and void; protests dismissed as premature; entries ordered returned to district director for appropriate administrative action	Hancock Gross Mfg., Inc. v. U.S. (C.D. 3459) Hancock Gross, Inc. v. U.S. (C.D. 4662)	Philadelphia Sink strainers and bases (not entireties)

Judgment of the United States Customs Court in Appealed Case

JUNE 5, 1978

APPEAL 77-28.—Stella D'Oro Biscuit Co., Inc. *v.* United States.—BAKERY OVEN AND EQUIPMENT—INDUSTRIAL OVENS AND PARTS THEREOF—INDUSTRIAL MACHINERY FOR PREPARING AND MANUFACTURING FOOD OR DRINK AND PARTS.—C.D. 4709 affirmed February 23, 1978. C.A.D. 1205.

International Trade Commission Notice

Investigations by the United States International Trade Commission

DEPARTMENT OF THE TREASURY, *June 22, 1978.*

The appended notices relating to investigations by the United States International Trade Commission are published for the information of Customs Officers and others concerned.

R.E. CHASEN,
Commissioner of Customs.

In the Matter of CERTAIN SWIVEL HOOKS AND MOUNTING BRACKETS	INVESTIGATION NO. 337-TA-53

Notice of Investigation

Notice is hereby given that on May 9, 1978, Coats & Clark, Inc. (complainant), 72 Cummings Point Road, Stamford, Connecticut 06904, filed a complaint with the United States International Trade Commission under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337). The complaint alleges unfair methods of competition and unfair acts in the unauthorized importation and sale of certain swivel hooks and mounting brackets for hanging plants and other objects in the home, by reason of the following:

(1) the alleged coverage of the swivel hooks by claims 1, 2, 3, and 4 of U.S. Patent No. 3,995,822, which patent is owned by the complainant;
(2) the alleged coverage of the mounting brackets by all claims of U.S. Patent No. 4,049,255, which patent is owned by the complainant;
(3) the alleged violation of the common law trademarks "SWIVEL HOOK/EYE" and "SWIVEL CEILING HOOK," which are allegedly common law trademarks owned by the complainant;
(4) the alleged unlawful copying of trade dress associated with the swivel hooks and mounting brackets produced and sold by the complainant which are the subject of this investigation;

(5) the alleged unlawful importation sale, and offers for sale of swivel hooks and mounting brackets bearing false designations of origin; and
(6) the alleged unlawful acquisition and use of know-how transmitted in confidence by the complainant to one of the respondents named below, Sato Metal Trading Company, Ltd., concerning such swivel hooks and mounting brackets.

The complaint alleges that such unfair methods of competition have the effect or tendency to destroy or substantially injure an industry efficiently and economically operated in the United States.

Complainant requests a permanent exclusion order against swivel hooks and mounting brackets which infringe its U.S. Patents Nos. 3,995,822 and 4,049,225; which infringe its trademarks; which falsely designate origin; and which copy its trade dress.

Having considered the complaint, the United States International Trade Commission on June 7, 1978, ORDERED:

1. That, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), an investigation be instituted to determine, under subsection (c) whether, on the basis of the allegations set forth in the complaint and the evidence adduced, there is a violation of subsection (a) of this section in the unauthorized importation of certain swivel hooks and mounting brackets into the U.S., or in their subsequent sale by reason of:

(1) the alleged coverage of the swivel hooks by claims 1, 2, 3, and 4 of U.S. Patent No. 3,995,822, which patent is owned by the complainant;
(2) the alleged coverage of the mounting brackets by all claims of U.S. Patent No. 4,049,225, which patent is owned by the complainant;
(3) the alleged violation of the common law trademark "SWIVEL HOOK/EYE" and "SWIVEL CEILING HOOK," which are allegedly common law trademarks owned by the complainant;
(4) the alleged unlawful copying of trade dress associated with the swivel hooks and mounting brackets produced and sold by the complainant which are the subject of this investigation;
(5) the alleged unlawful importation sale and offers for sale of swivel hooks and mounting brackets bearing false designations of origin; and
(6) the alleged unlawful acquisition and use of know-how transmitted in confidence by the complainant to one of the respondents named below, Sato Metal Trading Company, Ltd., concerning such swivel hooks and mounting brackets;

the effect or tendency of which is to destroy or substantially injure an industry efficiently and economically operated in the United States.

2. That, for the purpose of this investigation so instituted, the following are hereby named as parties:

a. The complainant is Coats & Clark, Inc., 72 Cummings Point Road, Stamford, Connecticut 06904.

b. The respondents are the following companies alleged to be involved in the unauthorized importation of such articles into the United States, or in their sale, and are parties upon which the complainant and this notice are to be served.

(1) Jordan Industries, Inc.
3030 N.W. 75 Street
Miami, Florida 33147
(2) Carol Cable Company
249 Roosevelt Avenue
Pawtucket, Rhode Island 02862
(3) Sato Metal Trading Co., Ltd.
No. 13, 2-Chome, Kanda-Sudacho
Chiyoda-ku, Tokyo, 101, Japan
(4) Sato American Metal, Inc.
60 E. 42nd Street
New York, New York 10017
(5) Japan Hardcraft, Inc.
c/o Ostrolenk, Faber, Gerb & Soffer
260 Madison Avenue
New York, New York 10016

c. Jo Ann Miles. U.S. International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, is hereby named Commission investigative attorney, a party to this investigation.

3. That, for the purpose of the investigation so instituted, Judge Donald K. Duvall, U.S. International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, is hereby appointed as presiding officer.

Responses must be submitted by the named respondents in accordance with section 210.21 of the Commission's *Rules of Practice and Procedure*, (19 C.F.R. 210.21). Pursuant to sections 201.16(d) and 210.21(a) of the Rules, such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting a response will not be granted unless good and sufficient cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute waiver of the right to appear and contest the allegations of the complaint and of this notice, and will authorize the presiding officer and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both a recommended determination and a final determination, respectively, containing such findings.

The complaint, with the exception of business confidential information, is available for inspection by interested persons at the Office of the Secretary, U.S. International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, and in the New York City office of the Commission, 6 World Trade Center.

By Order of the Commission.

KENNETH R. MASON,
Secretary.

Issued: June 9, 1978

In the Matter of
CERTAIN ROLLER UNITS } Investigation No. 337–TA–44

Notice Resetting Prehearing conference and Hearing

Notice is hereby given that the Notice of Prehearing Conference and Hearing issued by the undersigned Presiding Officer on June 2, 1978 is rescinded. A new schedule for Prehearing Conference and Hearing is set forth below.

The Prehearing Conference in the above styled investigation is hereby reset for July 17, 1978 at 10:00 a.m. in the Hearing Room of the Administrative Law Judge, Room 610 Bicentennial Building, 600 E Street, N.W., Washington, D.C. On or before July 12, 1978 the parties will complete service of prehearing conference statements. The purpose of this Prehearing Conference is to review such statements, complete the exchange of exhibits, and resolve any other necessary matters in preparation for the Hearing.

Notice is also given that the Hearing in this proceeding is hereby reset for 10:00 a.m. on July 19, 1978, or on a day thereafter subject to 48–hour advance oral notice to the parties, in the Hearing Room of the Administrative Law Judge, Room 610 Bicentennial Building, 600 E Street, N.W. Washington, D.C. and will continue daily until completed. The parties shall complete discovery on or before July 7, 1978.

The Secretary shall serve a copy of this notice upon all parties of record and shall publish this notice in the FEDERAL REGISTER.

JUDGE DONALD K. DUVALL,
Presiding Officer.

Issued June 13, 1978.

TA–332–92

A Baseline Study of the Telephone Terminal and Switching Equipment Industry

Notice of Hearing

Investigation instituted. In response to a request by the Subcommittee on Trade of the Committee on Ways and Means, U.S. House of Representatives, received on December 4, 1977, the United States International Trade Commission instituted the above-captioned investigation on January 13, 1978 (43 F.R. 2775, January 19, 1978).

Public hearing ordered. A public hearing in connection with this investigation will be held in Washington D.C., on Tuesday, September 26, 1978, at 9:00 a.m., e.d.t., in the Main Hearing Room, Room 331, United States International Trade Commission, 701 E Street NW., Washington D.C. Requests for appearances at the hearing should be received in writing by the Secretary of the Commission at his office in Washington D.C., not later than noon Thursday, September 21, 1978.

Written submissions. Interested persons may submit written statements. Any commercial or financial information for which confidential treatment is requested must be submitted in conformance with the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. 201.6). All written submissions, except for confidential business information, will be made available for inspection by interested persons. To be assured of consideration by the Commission, written statements should be submitted at the earliest practicable date, but not later than October 13, 1978. All such submissions should be addressed to the Secretary, United States International Trade Commission, 701 E Street NW., Washington, D.C. 20436.

By order of the Commission:

Kenneth R. Mason
Secretary.

Issued: June 14, 1978

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Court of Customs and Patent Appeals

Customs Court

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